In The
SUPREME COURT OF THE UNITED STATES
October Term 1975

NO. 75-1876

IN THE MATTER OF: SAMUELS & CO., INC.,
BANKRUPT

CURTIS R. STOWERS, ET AL,

Petitioners

v.

JAMES S. MAHON, Trustee, and
C.I.T. CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NOTE: The undisputed facts are as found in the original opinion of the Supreme Court, 40 L. Ed. 2d 79; and the original (now reversed) opinion of the panel, 510 F.2d 139.

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The petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case February 17, 1976. The Petition for Review was denied April 1, 1976.

JURISDICTION

The final Judgment of the Court of Appeals was entered on April 1, 1976. The denial of a timely Motion for Rehearing En Banc was entered April 1, 1976. This Petition for Certiorari is filed within 90 days of April 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

OPINION BELOW

The Supreme Court in a per curiam opinion reversed and remanded the case to the Fifth Circuit, 416 U.S. 100; 40 L. Ed. 2d 79, (on a different point than presented here), and the Fifth Circuit on March 20, 1975, (510 F.2d 139), again held petitioners should prevail, however, on rehearing en banc a divided Fifth Circuit reversed the panel and on February 17, 1976, held respondents should prevail, substituting the original dissenting opinion of Judge Godbold as the opinion

of the Court; with Judge Ainsworth and four other judges dissenting (526 F.2d 1238), as set forth in the Appendix.

The statutes involved are the Packers & Stockyards Act, 7 U.S.C.A. 191-195, and regulations, 9 C.F.R. 201.43(b) and 201.99 are pertinent. The Texas Business and Commerce Code (U.C.C.), Sec. 9.104(1),(3); Secs. 1.102, 1.103, 1.203, 1.205, 1.201(3), 2.103(a)(2), 1.201 (19), 2.507, 2.511(c), and 2.702(3) are pertinent. These are set forth in the Appendix.

QUESTIONS PRESENTED

The case presents novel questions that have attracted lawyers, scholars, and students all over the United States. Many cases all over the United States hinge on the decision of this Court.

1. These were cash sales and respondent's lien never attached.

2. We feel that the P & S Act and regulations considered in the light of the day to day trading for six prior years of

these same parties is dispositive of the Texas law.

3. We further feel that Texas law alone (Texas Business & Commerce Code) not considering the P & S Act gives petitioners relief (see 510 F.2d 139; the dissent in 526 F.2d 1238).

4. We assert that since this is a bankruptcy case in equity, substance rather than form should prevail over the highly technical opinion.

5. Under the facts of this case, the P & S Act and U.C.C. are to be read together, and read together either or both affords relief.

6. The ten day reclamation rule is a rule relating to credit sales, not cash sales as found by the Appeals Court.

7. The respondents were not merchant good faith purchasers, so even if their lien could attach, they are not merchant good faith purchasers for value (see

Judge Ainsworth dissent).

8. Petitioners further submit that fundamental error was committed by the receiver the last week of May, 1969, when he, perhaps without knowledge of the prompt pay regulation of the P & S Act failed to follow them.

In this regard the receiver is in a delicate position because the referee himself has ordered this receiver to pay these petitioners, yet he is a contender here for the money should C.I.T. fail. This to us is not clear.

STATEMENT OF THE CASE

The facts are as stated by this Court in 40 L. Ed.2d 83, 84, appended to this petition, and as stated herein. Petitioners are the cattle sellers, respondents are the lender, and Samuels was the packer.

These were cash sales as found by the

Appeals Court.

The referee ordered the petitioners' perishable carcasses sold and the proceeds held until the parties could fight out priorities. For over six years the same parties operated under the P & S Act and its regulations. During this time respondents had a lien on property owned by the bankrupt.

It was in the interest of respondents that the packer during these six years comply with the P & S Act and regulations to avoid sanctions.

The respondents knew of the P & S Act and its prompt pay provisions, and we insist obviously never looked to the unpaid for carcasses as a part of its security. They loaned millions on accounts receivable and other property owned by the packer, knowing all the time that the producer had to be paid before the close of business the following day after grade and yield

was determined. Thus the conduct and manner of doing business altered the U.C.C. lien agreement's technical terms.

Also the U.C.C. retains the principles of equity (Sec. 1.103), and the decision in this case is adverse to equity. The bankruptcy court is a federal court of equity, as well as of law. Here we have the court penalizing the producer because he did not file a security interest almost every day, for their sales were that frequent.

Under the Texas U.C.C. we submit the parties could vary the terms of the floating lien of respondents by custom and usage and by agreement, express or implied. P & S regulations mandating prompt payment also altered the transactions. Respondents could not have been innocent or merchant good faith purchasers for they knew of the demands in the P & S regulations that the producer must be paid. They

knew these were cash sales. They knew of the method and manner Samuels bought from the farmer. Thus the course of conduct mandated payment. Bankruptcy should not alter that.

We feel it would only burden the court to restate the now reversed opinion of the panel by Judge Ingraham and the scholarly dissent of Judge Ainsworth, which we adopt on the points that these were cash sales and that the packer did not own anything to which the lien attached and their reasons why C.I.T. was not a good faith purchaser.

The majority found them to be cash sales.

We add to this that the attachment of the security interest to the proceeds as a matter of law could not amount to a merchant good faith purchase as held by the Appeals Court. Also, equity would interpose rules of fair play and estoppel,

for the respondents were at least under a duty (found by all courts) to inquire of the procedure required in prompt payment of the carcasses. The position and day to day trading of the parties led unerringly to the conclusion found by Judge Ingraham and Judge Ainsworth that in effect the lender risked large sums of capital for interest payments and profit and in so doing had to analyze the manner, method, and way of the packers business. The lender was well acquainted with the packers and petitioners business transactions for six years. The referee found C.I.T. knew of the way the cattle were bought.

In short the case as it now stands amounts to a windfall for the lender. This is not the same as the credit purchase by the packer of its annual supply of light bulbs or pencils, or nuts and bolts and screws; this was the continuing cash purchase of its largest raw material item in

dollar volume done daily the same way under the P & S Act, the life blood of the business, with the full knowledge and consent of the respondents. Why? Because under the regulations promulgated under the P & S Act there is a difference in the sale of cattle and the sale of pencils. This was dispositive of the state law.

REASONS FOR GRANTING THE WRIT

The case presents a very important federal question to producers all over the United States and should be decided by this Court.

1. In Bank of Marin v. England, 17 L. Ed. 2d 197, the Supreme Court stated that principles of equity governed the conduct of the bankruptcy court, and as stated by Justice Douglas in Pepper v. Litton, 84 L. Ed. 281, courts of bankruptcy are courts of equity and their proceedings are inherently proceedings in equity (at p. 288 referring to equity powers):

> "They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.
>
> By reason of Sec. 2 (of the Bankruptcy Act) these equitable powers are to be exercised on the allowance of claims, a conclusion that is fortified by 27K."

We mention this because the majority of the Appeals Court have seemingly overlooked the fact that long before adjudication of straight bankruptcy in April 1970, the referee considered these as "claims" and subsequently held them to be cash transactions, and ordered them paid. We submit he correctly did so on the principles of equity. The Court of Appeals has not done equity in this case.

As stated by this court in Katchen v. Landy, 15 L. Ed. 2d 392:

> "Bankruptcy courts characteristically proceed in a summary fashion to deal with the assets they are administering."

See also SEC v. U. S. Realty, 84 L. Ed. 1293; 310 U.S. 434. Such claims are investigated by "changing methods." Thus the referee reasoned that the parties equitable position dictated the producers to be paid and they not turned into a "specie of involuntary creditor."

Petitioners (now in the seventh year of litigation) have known all along that a strict and purely technical and legalistic view of the U.C.C. would have to be offset by the conduct fair dealing and day to day trading of the parties, and that the intention of the parties must prevail. The P & S Act and regulations 201.43(b) and 201.99 were enacted to protect the producer's purse.

2. Another theory is that the U.C.C. of Texas itself mandated relief. It retains the principles of equity and estoppel. It states that custom and usage shall be followed (see Sec. 1.205, 1.102).

It states that agreements (floating liens) may be altered by implied agreement (see original opinion of Judge Ingraham). It states that a course of conduct may prevail over the written agreement. It states the cash sale is conditioned on payment. This then is one of our arguments.

These sales were not a credit transaction although the majority opinion dealt with them in a legal sense as though they were, while nevertheless stating that they were cash sales.

For years the packer paid properly and promptly by check. Every petitioner here holds a dishonored check because on May 23, 1969, the respondents refused to advance money on their weekly loans. We charge they knew or should have known that this course of action would cause the bank to dishonor the checks. Thus Judges Ingraham and Ainsworth reasoned.

Aside from that, however, the confusion of bankruptcy caused disorder in the process. The perishable meat had to be sold. We then have shown even more reasons why the P & S regulations are paramount.

The majority would penalize these farmers for failing to file security interest agreements even after they were issued checks, yet although perhaps technically ignorant, did they not have a reason to believe six years of custom and day to day tradition and trading would remain the same and they would be paid? A Chapter XI proceeding is not a quiet procedure; yet had it been successful petitioners would have been paid.

The Fifth Circuit is sharply divided on the interpretations of the U.C.C. of Texas and the P & S Act and regulations as they deal with cash transactions, Judge Ainsworth declaring the very

validity of the transaction is rooted in payment (U.C.C. 2507(b); 2.511(c)).

The receiver stood in the packer's shoes and the packer's right to retain or dispose of the carcasses terminated for failure to pay as relates to respondents. Nothing was <u>owned</u> under U.C.C. 2507(b) to which the lien attached. We have stated throughout years of litigation, the receiver obviously did not know of the prompt pay regulations or he would have followed them to the letter. Then where would respondents be?

We also state alternatively that because the P & S Act and the day to day relation of the parties mandated <u>payment</u> the respondents looked for its security to the paid-for carcasses on the rail; not the unpaid for carcasses. No one refutes this statement.

If under the strict and technical

application of law of Texas alone, respondents have an argument (in an opinion that could be decided either way) would not the principles of equity, so well established in bankruptcy, dictate that substance should prevail over the strict formality of the U.C.C.? We submit the answer is "Yes." When the U.C.C. is read with the P & S regulations, do we not have a different light on the matter?

Can this court disagree with Judge Ainsworth when he states respondents gave no value for what it now pleasantly receives? Does the custom mean nothing?

Assume no Chapter XI and no payment to producers. Assume the P & S people moved in to investigate with existing power to invoke sanctions. Assume the packer owed C.I.T. $500,000. With these assumptions, would it be in C.I.T.'s interest that the producer be paid? We think so. Hence, the only thing to change

these assumptions is a ChapterXI petition.

Finally we submit a court of equity should not allow the bare knuckles of the law to knock out these claimants. This inequity is reflected in this passage from the majority opinion:

> "However slight or tenuous or marginal cattlebuyers' interest were in cattle for which buyer issued checks which were subsequently dishonored, the interest was great enough to permit attachment of lien of buyer's creditors in buyers after acquired property."

This completely overlooks the fact that the U.C.C. allows variance by implied agreement. This is looking to form, not substance. To give the greatest possible freedom possible to commercial vendors and purchasers is an idealistic goal, but to say in the same sentence this harsh rule allows the result reached is overly legalistic. The U.C.C. imposes the obligation of merchant good faith (1.203, 2.103(2)). Merchant good faith means

fair dealing.

To say a buyer is granted the power to do something he lacks power to do and allowing it to happen as this case does, borders on being illogical in view of our facts, yet this is the majority view (at 526 F.2d 1242).

3. The Appeals Court interprets Sec. 2.507, Comment 3, to impose an "absolute requirement" that the cash seller demand a return of the goods within ten days after receipt by the buyer (526 F.2d at p. 1245). Thus, the cash seller is deemed to be subject to the same ten day limitation period that applies to a seller for credit, as set forth in the very wording of Sec. 2.702(b).

Does Comment 3 of Sec. 2.507 really dictate such a strict limitation for the cash seller? Sec. 2.507(b), the actual statute, reads:

> "(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due."

This is very clear language. Comment 3 thereon states:

> "Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's 'right as against the seller' conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this Article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here."

The key word here is "credit." These were cash sales.

Is not "waiver" though a failure to follow up Sec. 2.507 rights the essence of Comment 3? The ten day rule referred to in the last sentence of Comment 3 seems

to merely be applicable to determining the issue of waiver and to not be a strict limitation period. Had the strict limitation period been intended, would not the drafters have put the ten day limitation in the very wording of Sec. 2.507?

The most recent case cited by the majority en banc as authority for their strict interpretation of Sec. 2.507, In re: Colacci's of America, Inc., 490 F.2d 118 (10th Cir. 1974), actually supports the above "waiver" viewpoint of these petitioners. The seller in the Colacci case demanded the payment for several months after delivery, but never sought the return of the goods, which amounted to tacit consent to its retention by the buyer (Id. at p. 1120). While the transaction was negotiated as a cash sale with payment due on delivery, it was held that it became a credit sale because of the failure of the seller to follow up his

Sec. 2.507 rights (Id. at pp. 1120-1121). In the words of the Court:

> "The record here shows that the seller did nothing while the sale was a cash sale to 'follow up' his rights. Thus there was a waiver by inaction relative to retention as the Comment contemplates." (Id. at p. 1120)

(Here our meat was perishable.) Thus the court is holding that there was a waiver of the seller's Sec. 2.507 rights which resulted in the sale becoming one for credit. The Tenth Circuit Court does not hold, as does the majority Fifth Circuit En Banc Court in citating In Re Colacci's of America, Inc., that:

> "Moreover, these Courts which have permitted reclamation under Sec. 2.507 have invariably adhered to 2.507, Comment 3's express requirement that demand for return be made within ten days after receipt by the buyer or else be lost." (526 F.2d at p. 1245)

Other cases cited in the majority opinion also do not support the above statement. Stumbo v. Paul B. Hult

Lumber Co., 251 Or. 20, 444 P. 2d 564, 571 (1968), did not involve a cash sale. There the payment was neither due nor demanded on delivery of the logs, and thus Sec. 2.507 was not applicable (Id. at p. 571). In re Mort Co., 208 F. Supp. 840, (E.D. Pa., 1962) does not hold that Sec. 2.507 requires the filing of a petition for reclamation within ten days, although the petition for reclamation in that case was filed in the Bankruptcy Court within ten days of the sale. That case was concerned more with the question of whether the sale was for cash or credit since payment was made with the check that was dishonored because of the filing of bankruptcy, and it was held that the sale was for cash.

In re Helms Veneer Corp., 287 F. Supp. 840 (W.D. Va., 1968), does support the majority en banc Fifth Circuit view, and it is submitted that this District Court

holding is simply in error. The ten day period is not intended to foreclose the waiver question but to only be a consideration in the factual determination thereof. Again had it been intended to legally foreclose the matter, the ten day rule would have been put in the statute itself rather than in a comment concerned primarily with waiver. The comment certainly is of lesser status yet the majority give it great weight.

The petitioners here have not waived their Sec. 2.507 rights. By the time that they knew of their problem by virtue of the bank's stopping payment on their checks, the cattle which they had sold had already been processed. The referee found as a matter of fact that these cash sellers could not identify their livestock and that some of the carcasses had already been sold.

Thus the referee's order of August 13, 1969, reserved the proceeds of the sale of these carcasses for further consideration as it stated (C.I.T. could not reclaim):

> "(a) Accounts receivable of the debtor resulting from sales or deliveries by the debtor on May 23, 1969, and as to which accounts receivable no advances were made by C.I.T. and any other accounts receivable as to which C.I.T. made no specific advances."

Thus C.I.T.'s claim to these proceeds was recognized as very questionable from the outset.

More important this order classified the various claims and clearly shows the referee knew that certain items sold by the bankrupt on or after May 23 probably would have come from property other than which the C.I.T. lien applied.

As stated elsewhere in this petition, we submit the petitioner's conduct, knowing the funds were impounded, was reasonable and should not be penalized with

such a strict, technical standard. Especially one that applies to credit sales.

On about the same day the bank stopped payment on petitioners checks, May 23, 1969, Samuels & Co. was placed in a Chapter XI reorganization and a receiver was appointed. Had the receiver properly followed the applicable regulations of the P & S Act, these petitioners would have been paid in the ordinary course of business.

Because of their expectation of payment in accordance with the usual course of dealing, these cash sellers asked for their payment when they filed their reclamation petition. Another factor in their delayed filing was that the referee in bankruptcy issued the above order August 13, 1969, an order stating that it was considering the question of whether C.I.T. was entitled to accounts receivable resulting from sales or deliveries on and after

May 23, 1969, and other dates as to which accounts receivable no advances were made by C.I.T. Furthermore, a filing of a petition for reclamation would have been futile because their livestock had already been butchered and processed. Thus a futile exercise is demanded by the majority.

The Supreme Court of Texas has established that there is no waiver as a matter of law of cash sale rights even though the seller knows that the buyer intends to immediately resell the goods. In Continental Oil Co. v. Lane Wood Co., 443 S.W.2d 698, (Tex. Sup. Ct., 1969) it was held that the issue of waiver was one of fact where delivery was made with knowledge that the buyer expected to resell. In that case, sellers received insufficient fund checks and the buyer went into bankruptcy, which also occurred in the instant case. The waiver question was

concerned with whether the sellers had waived their right to condition delivery upon payment.

The dissenting opinion having the support of five judges en banc deserves the utmost consideration of this court. See 526 F.2d at pp. 1250-1254. Also the majority panel decision on this question (510 F.2d at pp. 144-148), incorporated to some extent in the dissenting en banc opinion, most certainly has merit.

4. The Packers & Stockyards Act and regulations is dispositive of state law under these facts.

BASIC ERROR

In the majority opinion, 526 F.2d 1238, the court erred as shown in Footnote 3, p. 1241, and we quote:

> "Also we note a matter not mentioned in the dissenting opinion of Judge Godbold. The District Court, which adopted the referee's finding of fact but rejected his conclusion of law, held that C.I.T. and trustee

> "in bankruptcy, were good faith purchasers for value, and the Supreme Court in its opinion referred to them as such. (40 L. Ed. 2d 84)"

This court made no such finding as clearly explained in Judge Ainsworth's dissent at pp. 1254-1255. Referring to the error, Judge Ainsworth said:

> "But the Supreme Court did not so hold."

He continues on p. 1255:

> "There would have been no reason for the Supreme Court to remand this case to us for further consideration had it held in its opinion that C.I.T. and the trustee were good faith purchasers for value. Such a holding would have ended the matter."

If some of the judges on the Fifth Circuit thought the Supreme Court had so decided, this could be relevant and lead to error, for such judge might assume, as Judge Ainsworth points out, that since this court had held C.I.T. to be good faith purchasers (which was not so held), there was nothing left to decide.

We submit this requires the attention of the Supreme Court. Thus the dissent is correct; the majority incorrect.

CONCLUSION

In addition to our theory that petitioners should prevail under equitable principles, we strongly insist relief is afforded under both the P & S Act or the U.C.C. of Texas, or both read together.

1. The P & S Act and its requirements of prompt pay and the course of conduct mandated thereby prevails over the technical application of the U.C.C. under the peculiar facts of this case; and

2. The U.C.C. itself, aside from equitable considerations, or the P & S Act, give petitioners relief (also see U.C.C. 9.104(1)).

Our argument under (1) is simple in that the manner and method and way, prior to May 23, 1969, cattle were sold to the packing industry all over the United

States is exactly the way these cattle were sold daily to this packer. We know of no sellers anywhere who filed security agreements. Millions of cattle each year worth millions each business day were sold and paid for under the prompt pay provisions of the P & S Act. Lenders and packers all over the United States handled millions in loans daily knowing the cattle had to be paid for promptly - cash sales. Additionally the prompt pay regulations of the P & S Act isinextricably intertwined with the U.C.C. in this case, which states (Sec. 1.205(c)):

> "A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or quality terms of an agreement." (Emphasis used)

And Sec. 1.205(a):

> "A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of

> "understanding for interpreting their expressions or other conduct." (Emphasis supplied)

Thus prompt pay is strengthened by custom and usage under the U.C.C.

We submit "agreement" means the C.I.T. lien. We submit the lien was qualified by the course of daily and year on year dealing. A lien, such as C.I.T. held can thus be altered by the action of the parties.

Surely the fact that C.I.T. and the packer lent and borrowed money on property "owned by the packer" took into consideration the known fact, by each of them, that the borrower was under a regulation commanding prompt payment to these petitioners. This means, we take it, the P & S Act had to be followed before the U.C.C. latched on to the proceeds of the court ordered sale, or that a court of equity would so decide. It is mandated by the conduct of these parties.

Under our theory of (1) and (2) above

we would be presumptuous if we tried to improve on the original and scholarly opinion of Judge Ingraham and the present dissent of Judge Ainsworth. We adopt these by reference into this petition for they are cogent and clear.

To the contrary the majority relies too heavily on the comment under 2.507 (Comment 3) regarding ten day reclamation under these facts, and is incorrect as clearly shown by Judge Ingraham, who at 510 F.2d 139 at p. 144, says (on remand from this court):

> "The buyer's right as against the seller to retain or dispose of them is conditional upon his making payment when due." (Discussing 2.507(b)).

This is, he continued:

> "Where payment is due and demanded on the delivery to the buyer of goods."

Payment was demanded here by the

farmers and by custom and usage and the P & S Act and regulations.

Thus we have the Appeals Court stating in effect to the farmer you have no rights under Sec. 2.507(a), you are out of the picture because you failed to reclaim your carcasses which had been sold because they were perishable and turned into cash proceeds (in ten days), and you may take no comfort in the fact that you had been told by the referee that you could litigate priority later on and yes even though you knew it was a Chapter XI proceeding. (The receiver operated the plant until May, 1970.)

We agree C.I.T. had a lien that attached to property <u>owned</u> by the packer. Consider then that P & S Regulation 201.99(b) required that identity of carcasses for the benefit of the producer be maintained until <u>payment</u> the next day (9 CFR, 201.43 (b)), and that records be kept. Now,

please consider that on May 23, 1969, the tagged carcasses were in the cooler and a lawyer is the court's receiver operating the plant. This is the precise point where the receiver failed, and no lien attached. Could he have resisted the petitioners had they chose to back up trucks to get their tagged carcasses? Who owned the meat? Does the voluntary petition in bankruptcy completely change the situation? Did the receiver stand in bankrupt's shoes?

The Code says (Sec. 2.507(b)):

> "His right as against the seller to retain or dispose of them is conditioned upon his making the payment due." (Emphasis supplied)

To say as the Appeals Court has said, that at that point the respondents in good faith purchased by operation of law the goods is going too far.

U.C.C. Sec. 1.201(19) says:

> "Good faith means honesty in fact."

And as found in Sec. 2.103(2):

> "Merchant good faith is honesty in fact and the observance of ... standards of fair dealing in the trade."

Then we consider that at this point the referee ordered the meat sold so the priorities could be worked out, yet the court has held at p. 1240, Keynote 16, (526 F.2d p. 1240):

> "Reclamation section of sales article does not grant seller a right to go after proceeds of the goods." (Sec. 2.507, 2.702).

So the court has said in effect that since you did not go through the futile task of backing the truck up to the door (even though the receiver and court had possession), you are barred from claiming the money proceeds despite the referee's order. This is bowing to form and not substance.

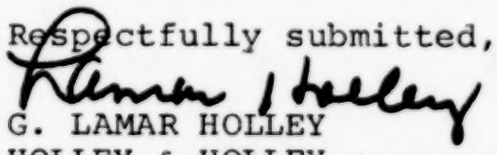
The writ should be granted so that this court may decide the question on which litigation all over the United States now hinges. The case here presented is of great importance to the country in view of its unique questions.

We respectfully submit the case presents a serious question that ought to be settled by this court.

PRAYER

We respectfully pray the writ be issued and that the Court of Appeals be reversed and the original panel decision be affirmed.

Respectfully submitted,



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STATEMENT

In addition to the original petitioners they are now supported in this petition by:

American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, Illinois 60068

The American Farm Bureau Federation is the largest voluntary general farm organization in the world, representing more than two million member families in all states except Alaska and in Puerto Rico. It is organized under the "General Not for Profit Corporation Act" of the State of Illinois for the purpose of promoting, protecting and representing the business, economic, social, and education interests of farmers and ranchers in the United States. The petitioners are also supported specifically by the following of the farm bureau organizations:

Texas Farm Bureau
Arkansas Farm Bureau Federation
California Farm Bureau Federation
Colorado Farm Bureau
Florida Farm Bureau Federation
Idaho Farm Bureau Federation, Inc.
Illinois Agricultural Association
Indiana Farm Bureau, Inc.
Iowa Farm Bureau Federation
Kentucky Farm Bureau Federation
Maryland Farm Bureau, Inc.
Mississippi Farm Bureau Federation
New Mexico Farm & Livestock Bureau
Oklahoma Farm Bureau
South Carolina Farm Bureau Federation
Tennessee Farm Bureau Federation, Inc.
Wyoming Farm Bureau Federation

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

NO. 73-1185

D. C. Docket No. BK-3-1314

In the Matter Of: SAMUELS & CO., INC., BANKRUPT

CURTIS R. STOWERS, ET AL,

Appellants,

versus

JAMES S. MAHON, Trustee, and C. I. T. CORPORATION,

Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN*, Chief Judge, INGRAHAM, (Continued)

*Chief Judge Brown did not participate in the decision of this case.

WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

JUDGMENT ON REHEARING ENBANC

This cause came on to be heard on rehearing enbanc without oral argument;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the opinion and judgment of the panel of this Court are reversed, and that the judgment of the District Court is hereby affirmed;

It is further ordered that appellants pay to appellees, the costs on appeal to be taxed by the Clerk of this Court.

February 17, 1976

GEE, Circuit Judge, specially concurring.

AINSWORTH, Circuit Judge, with whom BELL, INGRAHAM, COLEMAN and GEWIN, Circuit Judges, join dissenting.

Issued as Mandate:

CORRECTED

U. S. COURT OF APPEALS
FILED
APRIL 1, 1976

EDWARD W. WADSWORTH, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 73-1185

In the Matter of: SAMUELS & CO., INC.,
Bankrupt

CURTIS R. STOWERS, ET AL.,
Appellants,
versus

JAMES S. MAHON, Trustee, and
C. I. T. CORPORATION,

Appellees.

Appeal from the United States District Court
For the Northern District of Texas

ON PETITION FOR REHEARING

(APRIL 1, 1976)

Before BROWN,* Chief Judge, WISDOM, GEWIN,
(Continued)

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* Chief Judge Brown did not participate in the decision of this case.

BELL,** THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, INGRAHAM, RONEY and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

JUDGES GEWIN, COLEMAN, AINSWORTH and INGRAHAM dissenting for the reasons stated in the enbanc dissenting opinion.

** Judge Bell was a member of the original panel but resigned from the Court on March 1, 1976 and, therefore, did not participate in this decision.

WRITTEN OPINIONS BELOW

The full text of the two opinions of the Appeals Court (1) the panel decision (510 F.2d 139, and (2) the en banc decision, (526 F.2d 1238) is separately presented herewith because of the size.

Facts found by the Supreme Court in Mahon v. Stowers, 416 U.S. 100, 40 L. Ed. 2d. 79, 94 S. Ct. 1626: (At p. 83)

"The uncontested facts in this case are contained in the findings of the bankruptcy referee. The referee found that respondents, for a period of some ten days before Samuels filed a Chapter XI petition under the Bankruptcy Act, had been selling live cattle to Samuels for slaughter on a 'grade and yield' basis, and that this was a recognized custom and usage in the trade. Under this usage the contract price is left open at the time of delivery to the purchaser, who slaughters the livestock and allows the carcasses to chill for approximately 24 hours. At that time they are graded by the United States Department of Agriculture and the price is determined. The purchaser then gives the seller a check for the established amount. The referee further found that Samuels was subject to the regulations of the Packers and Stockyards Act, and that all of the livestock in question had been delivered to Samuels at its plant in Mount Pleasant, Texas, where it was slaughtered and then graded by the Department of Agriculture.

Until the livestock is actually graded and the yield determined, the sellers can identify their particular livestock, but once the carcasses are processed and the meat packaged, identification is no longer possible. When the (416 U.S. 103) petition for bankruptcy was filed in this case, none of the respondents was able to identify his own particular livestock,

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but the referee found that at least some of the carcasses sold by respondents were on Samuels' premises at that time. The referee also determined that no proceeds from sale of packaged meat could be identified as realized from carcasses delivered by respondents.

Examining the competing claims, the referee found that at all times material to the action C.I.T. was the holder of a duly perfected security interest in all livestock, animal carcasses, packaged and unpackaged meat, packing materials, and other inventory owned by Samuels or in which Samuels may have had an interest. At the time the bankruptcy petition was filed Samuels was indebted to C.I.T. in an amount in excess of $1,800,000. C.I.T. had been advancing large sums weekly to Samuels and the bankruptcy was precipitated on May 23, 1969, when C.I.T., deeming itself to be insecure, refused to make a weekly advance of approximately $184,000 which Samuels needed to continue its operations. The referee found that C.I.T. 'knew or should have known' of the method by which Samuels bought livestock from respondents on a grade and yield basis. He further found that no respondent held a security agreement with Samuels, and that none had filed a financing statement reflecting the transactions with Samuels.

The referee reasoned from these facts that respondents and Samuels had intended to transact their sales business on a cash, rather than a credit basis, and that title to the livestock 'did not pass from plaintiff to bankrupt until payment was made to plaintiff.' There-
(Continued)

fore, he concluded, C.I.T.'s perfected lien could not attach to the livestock in Samuels' inventory until the checks issued in payment were subsequently honored. Any (416 U.S. 104) other decision would, he said, make the cattle sellers 'a species of involuntary creditor against their wishes and intent,' although they had complied with normal selling arrangements under the Packers and Stockyards Act. He found it unnecessary for the respondents to identify proceeds from the sale of specific carcasses which they had delivered, and placed the duty on C.I.T. to show that the funds to which it laid claim had not been received from the sale of carcasses furnished by respondents."

PACKERS & STOCKYARDS REGULATIONS

Title 9 CFR §201.43(b) reads:

"(b) Purchasers to pay promptly for livestock. Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction. The provisions of this section shall not be construed to permit any transaction prohibited by §201.61(a) relating to financing by market agencies selling on a commission basis."

Title 9 CFR §201.99 reads:

"(a) Each packer purcnasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis shall, prior to such purchase, make known to the seller, or to his duly authorized agent, the details of the purchase contract. Such details shall include, when applicable, expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions."
(Continued)

"(b) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis, shall maintain the identity of each seller's livestock and the carcasses therefrom and shall, after determination of the amount of the purchase price, transmit or deliver to the seller, or his duly authorized agent, a true written account of such purchase showing the number, weight, and price of the carcasses of each grade (identifying the grade) and of the ungraded carcasses, an explanation of any condemnations, and any other information affecting final accounting. Packers purchasing livestock on such a basis shall maintain sufficient records to substantiate the settlement of each transaction.

"(c) When livestock are purchased by a packer on a carcass weight or carcass grade and weight basis, purchase and settlement therefore shall be on the basis of carcass price. This paragraph does not apply to purchases of livestock by a packer on a guaranteed yield basis.

"(d) Settlement and final payment for livestock purchased by a packer on a carcass weight or carcass grade and weight basis shall be on actual (hot) carcass weights. The hooks, rollers, and gambrels or other similar equipment used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare weight shall
(Continued)

include only the weight of such equipment: Provided, however, that until July 1, 1968, these packers who shroud carcasses before weighing them may include in the tare weight the average weight of the shrouds and pins.

"(e) Settlement and final payment for livestock purchased by a packer on a USDA carcass grade shall be on an official (final - not preliminary) grade. If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller or his duly authorized agent. For purposes of settlement and final payment for livestock purchased on a grade or grade and weight basis, carcasses shall be final graded before the close of the second business day following the day the livestock are slaughtered."

The foregoing are citations to the Texas Business and Commerce Code (U.C.C.):

§1.102. Purposes; Rules of Construction; Variation by Agreement

"(a) This title shall be liberally construed and applied to promote its underlying purposes and policies.

(b) Underlying purposes and policies of this title are

(1) to simplify, clarify and modernize the law governing commercial transactions;

(2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(3) to make uniform the law among the various jurisdictions.

(c) The effect of provisions of this title may be varied by agreement, except as otherwise provided in this title and except that the obligations of good faith, diligence, reasonableness and care prescribed by this title may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(d) The presence in certain provisions of this title of the words 'unless otherwise agreed' or words of similar import does not imply that the effect of other provisions may not be varied by agreement under Subsection (c).

(e) In this title unless the context

(Continued)

otherwise requires

(1) words in the singular number include the plural, and in the plural include the singular;

(2) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender."

§1.103. Supplementary General Principles of Law Applicable

"Unless displaced by the particular provisions of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

§1.201. General Definitions

"(3) 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this title (Sections 1.205 and 2.208). Whether an agreement has legal consequences is determined by the provisions of this title, if applicable; otherwise by the law of contracts (Section 1.103). (Compare 'Contract'.)"

"(19) 'Good faith' means honesty in fact in the conduct or transaction concerned."

§1.203. Obligation of Good Faith

"Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement."

§1.205. Course of Dealing and Usage of Trade

"(a) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(b) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(c) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(d) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is un-
(Continued)

reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(e) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(f) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter."

§2.103. Definitions and Index of Definitions

"(a)(2) 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

§2.507. Effect of Seller's Tender; Delivery on Condition

"(a) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(b) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due."

§2.511. Tender of Payment by Buyer; Payment by Check

"(a) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(b) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(c) Subject to the provisions of this title on the effect of an instrument on an obligation (Sec. 3.802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment."

§2.702. Seller's Remedies on Discovery of Buyer's Insolvency

"(a) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this chapter (Section 2.705).

(b) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(c) The seller's right to reclaim under Subsection (b) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Chapter (Section 2.403). Successful reclamation of goods excludes all other remedies with respect to them."

§9.104. Transactions Excluded From Chapter

"This chapter does not apply

(1) to a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property."

"(3) to a lien given by statute or other rule of law for services or materials except as provided in Section 9.310 on priority of such liens."

In the Matter of SAMUELS & CO., INC., Bankrupt.

Curtis R. STOWERS et al., Appellants,

v.

James S. MAHON, Trustee, and C.I.T. Corporation, Appellees.

No. 73-1185.

United States Court of Appeals, Fifth Circuit.

March 20, 1975.

In bankruptcy proceeding, sellers of cattle sought reclamation of cattle sold to the bankrupt, and also asserted a right to proceeds from the sale of the slaughtered meat. The United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., reversed referee's finding that the sellers had priority over creditor which had financed bankrupt meat packer's purchase of cattle, and sellers appealed. The Court of Appeals, 483 F.2d 557, reversed and remanded, and certiorari was granted. The Supreme Court, 416 U.S. 100, 94 S.Ct. 1526, 40 L.Ed.2d 79, reversed and remanded. The Court of Appeals, Ingraham, Circuit Judge, then held that (1) the sale of the cattle on a grade and yield basis was a cash sale, not a credit sale, (2) under the circumstances, strict application of a ten-day limitation on the right of the sellers to reclaim would be unwarranted, since, inter alia, it would have been a futile gesture for the sellers to attempt to reclaim their cattle after they had been slaughtered and lost their identity, (3) even assuming the validity of creditor's argument that the sellers had only an unperfected security interest that was subordinate to the creditor's perfected interest, it was still not entitled to prevail, since the buyer bankrupt, whose check was dishonored, never acquired rights in the cattle to which the creditor's lien on after-acquired property could attach, (4) the creditor did not qualify as a good faith purchaser, and (5) the trustee in bankruptcy's lien did not give him priority as against the sellers' rights to reclaim.

Reversed.

Godbold, Circuit Judge, dissented with opinion.

1. Sales ⇐202(1), 234(3), 316(1)

Under the common law, a sale for cash, as opposed to a sale on credit, meant that the seller of goods implicitly reserved the incidents of ownership or title until payment was made in full; if the buyer failed to make payment, the seller could regain possession of the goods by instituting an action in replevin; additionally, since the buyer did not obtain title until the seller was paid, a defaulting buyer was incapable of passing title to a third party and an unpaid seller could even reclaim goods sold by an intermediary to one who otherwise qualified as a bona fide purchaser.

2. Sales ⇐203, 316(1)

Under the common law, when the owner of goods sold them on credit, all incidents of ownership, including title, passed to the buyer; if the buyer subsequently failed to make payment, the seller's rights were only those of a creditor for the purchase price, and he had no right against the merchandise.

3. Sales ⇐203, 219(2)

Under the common law, a credit buyer of goods obtained all the incidents of ownership, including title, and was able to convey his interest in the goods,

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absolute ownership, to a third party without recourse on behalf of the seller.

4. Sales ⇐197

Uniform Commercial Code does not emphasize the historical concept of passing title to goods, and the location of title generally is not regarded as being determinative of the rights of adverse parties; instead of implementing the fictional concept of title, the countervailing interests of the parties are sometimes defined in terms of various rights, privileges, powers and immunities.

5. Sales ⇐203

Even though the title concept is reduced in significance in the Uniform Commercial Code, the Code recognizes and adopts the fundamental distinctions of the common law between cash and credit sales, at least with respect to the rights of an unpaid seller against the defaulting buyer. V.T.C.A. Bus. & C., §§ 2.507, 2.702.

6. Sales ⇐203, 219(2)

Although the Uniform Commercial Code gives a credit seller a limited right against the subject goods, it generally recognizes that when the sale is on a credit basis, all the incidents of ownership pass to buyer who may then convey such interest to certain third parties; the seller stands merely as a general creditor for the purchase price. V.T.C.A., Bus. & C. §§ 2.702, 2.702(b, c).

7. Sales ⇐202(1)

Like the cash sale doctrine at common law, the Uniform Commercial Code provides that when the buyer is to pay cash for the goods, the validity of the transaction is dependent upon his making payment, and when the buyer fails to pay, he does not even have the right to possess the goods; absolute ownership does not pass to the buyer until payment is complete. V.T.C.A., Bus. & C. §§ 2.507, 2.507(b).

8. Sales ⇐202(2)

Underlying the Uniform Commercial Code provision that payment by check "is conditional and is defeated as between the parties by dishonor of the check on due presentment" is the principle that, in order to encourage and facilitate commercial sales and economic growth generally, the recipient of a check in payment for goods is not to be penalized in any way for accepting such a commercially acceptable mode of payment. V.T.C.A., Bus. & C. § 2.511(c).

9. Sales ⇐202(1)

Underlying philosophy of the common-law cash sale doctrine has been embodied in the Uniform Commercial Code as adopted by Texas; like the traditional cash sale doctrine, the existence of a valid contractual relationship between the buyer and seller is dependent upon the buyer's completing his part of the bargain and paying for the merchandise. V.T.C.A., Bus. & C. §§ 2.507, 2.507(b), 2.511(c).

10. Sales ⇐82(1)

Course of conduct prescribed by the Packers and Stockyards Act and related regulations, coupled with the undisputed intent of the cattle sellers, compelled the conclusion that the sale of cattle to packing house was on a cash rather than a credit basis, even though the "grade and yield" terms required that the cattle be slaughtered and the carcasses chilled for 24 hours before the purchase price could be determined. V.T.C.A., Bus. & C. § 1.205(a); Packers and Stockyards Act, 1921, § 1 et seq., 7 U.S.C.A. § 181 et seq.

11. Sales ⇐316(1)

Uniform Commercial Code does not arbitrarily impose a ten-day limitation on the right of a cash seller to reclaim

IN RE SAMUELS & CO., INC.

when the buyer is insolvent, but does so in order to conform with the fundamental policy of the Code and the Bankruptcy Act; by imposing this limitation, a creditor is required to promptly disclose and identify his claim to property in the bankrupt's estate so that other creditors will not prejudice themselves. V.T.C.A., Bus. & C. § 2.507.

12. Bankruptcy ⇐328

When all claims of creditors are promptly disclosed, the Bankruptcy Act's objective of equitable distribution of the bankrupt's assets among its creditors is more fully assured. V.T.C.A., Bus. & C. § 2.507.

13. Bankruptcy ⇐140(1¼)
Sales ⇐202(1), 203

When a sale is made on credit, the purchased merchandise belongs to the estate of the buyer bankrupt and all the seller has is a security interest in the property; if the seller fails to perfect his interest, he stands as a general creditor with the rest of the unsecured creditors and is entitled only to his proportionate share of the bankrupt's estate; but when the sale is for cash, the merchandise belongs to the bankrupt's estate only if he pays for the goods; if payment is not made, the seller is not a mere creditor and therefore is not compelled to share proportionately with the general creditors of the estate.

14. Bankruptcy ⇐140(1)

Cash seller's reclamation of goods does not remove any assets of bankrupt buyer in which general creditors would share and thus does not prejudice the rights of a credit seller.

15. Sales ⇐316(1)

Strict application of ten-day limitation on reclamation right of cash sellers of cattle would be unwarranted, where the underlying purpose of the ten-day rule was satisfied, where the sellers made a faithful attempt to comply with the pertinent Uniform Commercial Code provisions, and where it would have been a futile gesture for the sellers to attempt to reclaim their cattle which had already been slaughtered and lost their identity. V.T.C.A., Bus. & C. § 2.507.

16. Sales ⇐304

A cash seller, paid by check, need not take steps to perfect and protect his interest in the goods sold; it would be unreasonable to require him to follow the litany of the Uniform Commercial Code and take measures to perfect an alleged security interest.

17. Sales ⇐300

Reasons for limiting a seller's interest to an unperfected security interest do not exist in a cash sale transaction. V.T.C.A., Bus. & C. §§ 2.401(a), 9.101 et seq., 9.301(a)(1).

18. Secured Transactions ⇐145, 146

In the event that a conflict among secured interest holders arises, the Uniform Commercial Code clearly provides that generally the unperfected interest will be subordinate to the perfected interest; the only exception to this rule is the purchase money security interest; and when the transaction involves inventory, the Code gives that particular interest priority over the perfected lien if, and only if, the holder perfects its interest when the buyer takes possession of the goods and the seller gives notice to the financier. V.T.C.A., Bus. & C. § 9.312(c)(1–2).

19. Secured Transactions ⇐8

Uniform Commercial Code was designed to supplement the agreement between the parties in commercial transactions when the parties failed to provide, not completely change the character of an existing relationship.

20. Secured Transactions ⇐117

Even assuming that cattle sellers had only an unperfected security interest that was subordinate to the perfected interest of creditor which financed buyer meat packer's operations, the creditor was still not entitled to prevail over the cash sellers, since, the buyer having paid for the cattle with a bad check, the buyer never acquired rights in the cattle to which the creditor's lien on after-acquired property could attach.

21. Sales ⇐197

Although the location of title to goods generally does not determine the rights of the parties, the Uniform Commercial Code provides that the title to goods follows their possession.

22. Secured Transactions ⇐117

Even assuming that buyer debtor had sufficient rights in cattle to which creditor's lien on after-acquired property could attach, the creditor's rights in the cattle, like the rights of the debtor, were conditional on the buyer complying with the terms of cash sale contract; and since the buyer had only a defeasible interest in the cattle that was terminated when its check was dishonored, the creditor's rights, derived solely from the rights of the buyer, also terminated.

23. Secured Transactions ⇐117

Extension of a secured party's rights in goods contemplates a sale or disposition to a fourth party, but it does not anticipate a termination of the right of the debtor in the goods with respect to the source from which the debtor procured the goods. V.T.C.A., Bus. & C. § 9.306(b).

24. Sales ⇐234(3)

Buyer of goods is, under the Uniform Commercial Code, vested with a limited interest that it can convey to a good faith purchaser and thus create in the purchaser a greater right to the goods than the original buyer itself had, and this is possible even when the original buyer obtains the goods as a result of giving a check that is later dishonored or when the purchase was made for cash; however, in order to attain this status, the second buyer must be a "purchaser" that gives "value" and acts in "good faith." V.T.C.A., Bus. & C. § 2.403.

25. Sales ⇐234(1)

While creditor which financed operations of meat packer gave value for cattle sold to the packer, it was not a "purchaser", in respect to its claim of being a good faith purchaser for value, where the packer, whose status as a "purchaser" was determinative of creditor's status, lost any rights in the cattle when its check was dishonored. V.T.C.A., Bus. & C. § 2.403.

26. Sales ⇐235(1)

Since creditor and meat packer were so intertwined in the management of the financial affairs of the packing business, the creditor could not possibly claim, in complete honesty, that it was unaware of the claims of unpaid cattle sellers; accordingly, the creditor could not qualify as a "good faith" purchaser and its interest in the cattle proceeds was thus subordinate to that of the sellers. V.T.C.A., Bus. & C. §§ 1.201(19), 2.403.

27. Bankruptcy ⇐188(2)

Lien of trustee in bankruptcy did not give him a priority of interest in the proceeds of the cash sale of cattle to the bankrupt as against the cattle sellers' rights to reclaim. Bankr.Act, § 70, sub. c, 11 U.S.C.A. § 110(c); V.T.C.A., Bus. & C. §§ 2.507, 2.702(c), 2.705.

Lamar Holley, Dallas, Tex., for appellants.

IN RE SAMUELS & CO., INC.

J. Richard Gowan, Dallas, Tex., for appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge:

On April 15, 1974, the Supreme Court in Mahon v. Stowers, 416 U.S. 100, 94 S.Ct. 1626, 40 L.Ed.2d 79 (1974), reversed the decision of this court,[1] concluding that the Packers and Stockyards Act[2] and the regulations promulgated under the Act do not preclude the application of the Uniform Commercial Code as adopted by the State of Texas. Near the end of the opinion, the Court noted that "we do not mean to say that a course of conduct mandated by the Act or the regulations might not, just as any other course of conduct, be relevant or even dispositive under state law. . . . To the extent that respondents in appealing to the Court of Appeals challenged [the district court's contrary] determination, it will of course be open for adjudication in the Court of Appeals on remand." 416 U.S. at 113–14, 94 S.Ct. at 1633. Pursuant to this order, we again review the case[3] in an attempt to define and resolve the rights of the litigants, and based on the applicable provisions of Texas law governing this commercial transaction, we conclude that the sellers are entitled to relief and reverse the judgment of the district court.

To briefly reiterate, the relevant facts are as follows. Samuels & Co., Inc., is a Texas meatpacking firm that purchases, processes and packages meat and sells the meat within and without the State of Texas. Since 1963 Samuels' operations, including its cattle purchases, have been financed on a weekly basis by C.I.T. Corporation. To secure its financing, C.I.T. has properly perfected a lien on Samuels' assets, inventory and all after-acquired property, including livestock when cattle are sold on a grade and yield basis, the contract price is incapable of immediate determination. The cattle must first be slaughtered, chilled and then graded before the purchase price can be calculated. When this procedure is followed, and no one contends that it was not, then the price is determined and a check is issued to the seller. No one, neither the parties to the litigation nor the courts that have attempted to resolve the issues, contested these factual determinations made by the referee. While it is true that the evidence on which the referee relied in arriving at these conclusions is not detailed in the record, these conclusions, made in light of the regulations and in the absence of contentions to the contrary or any doubts raised throughout the appellate process, constitute a sufficient basis on which we can rely in deciding the case. Moreover, from reading the opinion of the referee, it seems that the theories on which we rely are essentially those relied on by him in his holding for the cattle farmers.

1. In the Matter of Samuels & Co., Inc. v. Mahon, 483 F.2d 557 (5th Cir. 1973). This opinion has been noted unfavorably on at least two occasions. Note, 54 Boston Univ. L.R. 469 (1974); note, 52 Tex.L.R. 570 (1974).
2. 7 U.S.C. § 181 et seq. (1970).
3. One question that arises with respect to our second review is whether we can decide the questions presented without sending the case back to the district court for evidence of custom and practice. While the record is not as fully developed as it might be, we believe that the questions can be decided without a remand. Neither the district court, this court nor the Supreme Court questioned the factual findings of the referee in bankruptcy, and he specifically found that there was an established course of conduct existing between the parties. This course of conduct, as the referee pointed out, at least conformed with, if not conducted expressly in accordance with the federal regulations governing the transaction between the buyer and seller. Specifically,

that is from time to time purchased for slaughter and processing.

From May 12 through May 23, 1969, the appellants, fifteen cattle farmers, delivered their cattle to Samuels. Although the sellers did not receive payment for the sale simultaneously with delivery of the cattle, checks were subsequently issued to the sellers. On May 23, 1969, before these checks had been paid, C.I.T., believing itself to be insecure, refused to advance any more funds to Samuels for the operation of the packing plant. On that same day Samuels filed a petition in bankruptcy. Since C.I.T. refused to advance more funds, although apparently aware that there were unpaid checks outstanding, the appellants' checks issued in payment for cattle were dishonored by the drawee bank.

Because of the fungible nature of the cattle, the beef has long since been butchered and processed and sold through the normal course of business. The proceeds from the cattle sales have been deposited with the trustee in bankruptcy pending the outcome of this litigation. The issues in this case concern the priority of interest in these proceeds between a creditor of the debtor, which holds a perfected security interest in the debtor's after-acquired property, and a seller of goods to the debtor. Since the sellers have not been paid, they claim a superior right to the deposited proceeds and argue that they are now entitled to payment out of these proceeds. The finance corporation, on the other hand, contends that the sellers are merely unsecured creditors of the bankrupt and are not entitled to a prior claim to the funds, and alternately that the finance corporation qualified as a good faith purchaser of the cattle and is therefore immune to the sellers' claims of non-payment. For the reasons that follow, we conclude that the sellers should prevail.

I.

[1] In order to determine which provisions of the Texas Business & Commerce Code govern the relationships among the parties, the first question that must be resolved is whether this commercial venture was a cash or credit transaction. The significance of classifying a sale as a cash or credit transaction relates back to the common law and the historical passing of title concept. Under the common law, a sale for cash, as opposed to a sale on credit, meant that the seller of goods implicitly reserved the incidents of ownership or title to the goods until payment was made in full. If the buyer failed to make payment, the seller could regain possession of the goods by instituting an action in replevin. Additionally, since the buyer of goods for cash did not obtain title to the goods until the seller was paid, the defaulting buyer was incapable of passing title to a third party. Based on the cash sale doctrine, an unpaid seller could even reclaim goods sold by an intermediary to one who otherwise qualified as a bona fide purchaser.

[2, 3] When the owner of goods sold them on credit, however, all the incidents of ownership, including title, passed to the buyer. If the buyer subsequently failed to make payment, the seller's rights were only those of a creditor for the purchase price, and he had no right against the merchandise. Since in a sale on credit the buyer obtained all the incidents of ownership in the goods, including title, he was able to convey his interest in the goods, absolute ownership, to a third party without recourse on behalf of the seller. Corman, Cash Sales, Worthless Checks and the Bona Fide Purchaser, 10 Vanderbilt Law Review 55 (1956); Gilmore, The Commercial Doctrine of Good Faith Purchaser, 63 Yale L.J. 1057, 1060 & n. 10 (1954).

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Underlying the different characteristics and consequences of cash and credit sales are the expectations and intentions of the three parties concerned. When goods are sold for cash, the seller is assuming virtually no risk of loss because he believes that he has full payment for the goods in his hands. When the sale is for credit, however, the seller assumes a far more substantial risk and voluntarily relinquishes the incidents of ownership to the buyer. The buyer, possessed of these incidents of ownership, is capable of conveying title to a bona fide purchaser, completely terminating the rights of the seller in the goods. The credit seller recognizes that he will receive full payment for his merchandise only if the business of the buyer progresses normally and sales are made to third parties in the normal course of business. Note, The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2–403 of the Uniform Commercial Code, 72 Yale L.J. 1205, 1220 (1963). Although commercial transactions and the law governing such relationships has developed significantly since the conception of these doctrines, this reasoning with respect to the different risks assumed by the different sellers underlie and differentiate the two concepts and is as valid a distinction today as it was when the doctrines were originally conceived.

[4] The Uniform Commercial Code as adopted by the State of Texas has to some extent modified the common law doctrines of cash and credit sales. It is clear that the historical concept of passing title to goods is not emphasized in the Code, and the location of title generally is not regarded as being determinative of the rights of adverse parties. Helstad, Deemphasis of Title Under the Uniform Commercial Code, 1964, Wisconsin L.R. 362. Instead of implementing the fictional concept of title, the countervailing interests of the parties are sometimes defined in terms of various rights, privileges, powers and immunities.

[5, 6] But even though the title concept is so reduced in significance, the Code recognizes and adopts the fundamental distinctions of the common law between cash and credit sales, at least with respect to the rights of the unpaid seller against the defaulting buyer. The Code deals with a sale on credit in provisions separate from those dealing with cash sales. Section 2.702 specifically sets forth the credit seller's remedy and provides that when "the seller discovers that the buyer has received goods on credit while insolvent, he may reclaim the goods upon demand made within ten days after receipt . . . ." Texas Business and Commerce Code, § 2.702(b), V.T.C.A. (1968). This provision goes on to define the seller's priority rights against other specific parties, providing that "[t]he seller's right to reclaim under Subsection (b) is subject to the rights of a buyer in the ordinary course or other good faith purchaser or lien creditor under this chapter (Section 2.403)." *Id.* § 2.702(c). Although this section authorizes a limited right against the goods, it generally recognizes that when the sale is on a credit basis, all the incidents of ownership pass to the buyer who may then convey this interest to certain third parties. The seller stands merely as a general creditor for the purchase price.

[7] With respect to cash sales, however, § 2.507 of the Code explicitly recognizes that "unless otherwise agreed," "[w]here payment is due and demanded on the delivery to the buyer of goods

. . ., [the buyer's] right as against the seller to retain or dispose of them is conditional upon his making payment due." Texas Business and Commerce Code, § 2.507(b) (1968). Like the cash sale doctrine at common law, § 2.507 provides that when the buyer is to pay cash for the goods, the validity of the transaction is dependent upon his making payment, and when the buyer fails to pay, he does not even have the right to possess the goods. Absolute ownership does not pass to the buyer until payment is complete.

[8] The limited interest conveyed to the buyer prior to payment under § 2.507(b) is reemphasized in § 2.511(c), which deals specifically with the situation where payment for goods is made by check that is later dishonored. Section 2.511(c) provides that payment by check "is conditional and is defeated as between the parties by dishonor of the check on due presentment." Texas Business and Commerce Code, § 2.511(c) (1968). Underlying this provision is the principle that, in order to encourage and facilitate commercials sales and economic growth generally, the recipient of a check in payment for goods "is not to be penalized in any way" for accepting this commercially acceptable mode of payment. *Id.* Comment 4.

[9] Even though the Code deemphasizes the title concept of the common law, these two provisions strongly suggest that the underlying philosophy of the common law cash sale doctrine has been embodied here. Like the traditional cash sale doctrine, the existence of a valid contractual relationship between the buyer and seller is dependent upon the buyer's completing his part of the bargain and paying for the merchandise. When the buyer fails to pay, he no longer has even the right to possess the goods.

Mindful of these principles we turn to the facts of the instant case to determine whether the sale of the cattle to the packing house was on a cash or credit basis. This sale of goods must be regarded as a cash transaction rather than a credit transaction because of the established course of dealing between the buyer and sellers. A course of dealing, as defined by the Texas Commercial Code, is a "sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Texas Business and Commercial Code, § 1.205(a) (1968). As suggested by the Supreme Court in *Stowers, supra,* the Packers and Stockyards Act and the regulations issued thereunder so outline the course of conduct to be followed as between the cattle seller and the purchasing meat packer.

According to the Act and regulations, when a cattle grower sells his livestock on what is termed a "grade and yield" basis, the contract price to be paid is left open because it has yet to be determined. Before the purchase price can be determined, the cattle must be slaughtered and the carcasses chilled for twenty-four hours. After the meat is chilled, the Department of Agriculture grades it and determines the yield, and at that time the contract price can be set. When the price is set, a point sometime after delivery, a check is issued to the seller. 9 CFR §§ 201.43(b),—.99.

[10] While a lapse of time occurring between delivery of the cattle and payment, even if only a day, might be considered an extension of credit, the course of dealing between the parties establishes that this was a sale for cash. The delay between delivery and payment was not credit, but rather was the result of a procedure mandated by the Act and regulations that governed the relationship between the buyer and seller when cattle are sold on a grade and yield basis. This procedure apparently had been followed since the inception of the regulations requiring such conduct. Moreover, not only do the Act and regulations prescribe such a course of conduct, all the cattle sellers regarded this commercial venture as a cash transaction, and there is nothing in the record to suggest that the buyer regarded the delay in issuing the check as credit. The course of conduct prescribed by the Act and regulations, coupled with the undisputed intent of the cattle sellers, compels the conclusion that this was a cash and not a credit affair. Engstrom v. Wiley, 191 F.2d 684 (9th Cir., 1951); In re Helms Veneer Corp., 287 F.Supp. 840 (W.D.Va., 1968).

Having so concluded, we turn to §§ 2.507 and 2.511 in order to define the cash seller's rights and remedies. Although § 2.702, dealing solely with credit sales, specifically outlines the seller's right to reclaim the property and sets forth priorities as to certain third parties, neither §§ 2.507 or 2.511 explicitly define the cash seller's rights or priorities. The only indication of the seller's rights is in the comment following § 2.507, which implicitly authorizes the seller's right to reclaim and simultaneously imposes a ten day limit on that right when the buyer is insolvent. In re Mort, 208 F.Supp. 309 (E.D.Pa., 1962); Greater Louisville Auto Auction v. Ogle Buick, Inc., 387 S.W.2d 17 (Ky.Ct.App. 1965); J. White & R. Summers, The Uniform Commercial Code, 98 (1972); Kinyon, Outline of Buyer-Seller Rights and Remedies in Default and Breach Situations Under the UCC, 53 Minn.L.R. 729, 731 (1969).

[11, 12] While armed with a right to reclaim the cattle, the sellers failed to comply with the ten day limitation on that right. The record shows that the sellers did not file a petition for reclamation for almost a year. The Code does not arbitrarily impose this limitation on the seller's rights, but does so in order to conform with the fundamental policies of the Code and the Bankruptcy Act. By imposing this limitation, a creditor is required to promptly disclose and identify his claim to property in the bankrupt's estate so that other creditors will not prejudice themselves. Otherwise, a creditor might extend credit to the bankrupt subsequent to its filing a petition on the basis of a misapprehension that the bankrupt possesses unencumbered assets. Additionally, when all the claims are promptly disclosed, the objective of the Bankruptcy Act, equitable distribution of the bankrupt's assets among its creditors, is more fully assured. *See* J. White and R. Summers, The Uniform Commercial Code 872 (1972).

Although the sellers did not reclaim the property until sometime after the filing of Samuels' petition for bankruptcy, the purposes for imposing the limitation had been fulfilled. C.I.T. in its own behalf filed a reclamation petition on or before July 23, 1969, only about two weeks after the petition in bankruptcy was filed. A hearing was held, and on August 13, 1969, the referee in bankruptcy entered an order generally outlining C.I.T.'s claims to the assets and inventory of the bankrupt. In demonstrating its claim to Samuels' assets, there apparently was extensive disclosure of Samuels' financial affairs, all of which, as noted later, C.I.T. was intimately aware. At the end of the order,

the referee noted that "the asserted lien rights other than the debtor, C.I.T. Corporation and the receiver, are in no way prejudiced hereby and the court reserves for further consideration any question pertaining to conflicting claims of liens or lien priorities."

While all the claims were not particularized in the referee's order, the hearing and order disclosed many claims against the estate and demonstrated to the parties involved the great likelihood of other claims being asserted against the assets. The record does not disclose that any creditors prejudiced themselves by extending credit on what they believed to be unencumbered assets. Indeed, because C.I.T. had such an in depth knowledge of Samuels' financial affairs, it was well aware of the claims of the cattle sellers that were unpaid as a result of its refusal to advance more money. Recognizing the many conflicting claims against the estate, the referee wisely preserved the current state of affairs and specifically refrained from adjudicating any additional disputes until a later date.

[13] Nor does the seller's ultimate reclamation of the cattle, or rather proceeds from sale of the cattle, prejudice the rights of any creditors. When a sale is made on credit, the purchased merchandise belongs to the estate of the bankrupt and all the seller has is a security interest in the property. If the seller failed to perfect his interest, he stands as a general creditor with the rest of the unsecured creditors and is entitled only to his proportionate share of the bankrupt's estate. To allow him to recover his loss in full from the estate would prejudice the rights of the other creditors. In re Colacci's of America, Inc., Bar Control of Colorado v. Gifford, 13 U.C.C.Rep. 1023 (10th Cir., 1973); Engstrom v. Wiley, *supra*, 191 F.2d at 689; Engelkes v. Farmers Co-op Co., 194 F.Supp. 319 (N.D.Iowa, 1961).

[14] But when the sale is for cash, the merchandise belongs to the bankrupt's estate only if the buyer pays for the goods. If payment is not made, the seller is not a mere creditor and therefore is not compelled to share proportionately with the general creditors of the estate. The general creditors are not entitled to any portion of these assets because the goods do not belong to the bankrupt estate. The seller's reclamation of the goods does not remove any assets of the bankrupt in which general creditors would share and thus does not prejudice the rights of the seller on credit. Since the seller for cash is not a creditor and is not required to share with the general creditors in the estate as a creditor, he is entitled to his merchandise.

Also, C.I.T.'s initiation of the reclamation proceeding assisted in identifying the various creditors and thereby insured a more equitable distribution of the bankrupt's estate. When the various creditors and their claims are revealed at an early stage, all the parties involved are able to assess the current financial status of the bankrupt and the probability of obtaining some return on the credit extended to the bankrupt. Early identification of the claims, plus the referee's preserving all creditors' rights until a later time, insured an equitable distribution of the estate.

Besides the underlying purpose of the ten day rule being satisfied, the facts show that the sellers made a faithful attempt to comply with the provisions of the Code. As pointed out by appellees, due to the sellers' misapprehension of the events culminating in Samuels' bankruptcy, the sellers' reclamation petition

was not filed until almost a year after the filing of Samuels' bankruptcy petition. The sellers apparently believed that after Samuels filed the petition in bankruptcy on May 23, 1969, the packing house conducted normal operations. Only shortly after Samuels was adjudicated bankrupt on May 6, 1970, did the sellers file their petition for reclamation. Apparently the sellers thought that there was no need for them to assert their rights under the Code until after the adjudication of straight bankruptcy.

To add to the confusion, it is not clear from the Code that the sellers had any remedy to seek at all. While the Code sets forth the sellers' right to reclaim, under the peculiar facts of this case assertion of that right would seem futile. As pointed out earlier, the Packers and Stockyards Act and regulations issued thereunder require that when livestock is sold on a grade and yield basis, it must be slaughtered almost immediately and the carcasses chilled so that the purchase price can be determined. Through the normal processing thereafter the carcasses are butchered and packaged and the identity of the cattle is lost. Since each owner's property could not be identified, it would seem to have been futile to assert the right to reclaim. A conclusion requiring such an exercise in futility certainly would not conform with reason. Additionally, the sellers never even had the opportunity to protect their property by reclamation because the identity of most of the cattle was destroyed when the petition in bankruptcy was filed.

[15] Under these circumstances, strict application of a ten day limitation on the right to reclaim is unwarranted. The fundamental purposes of imposing the ten day limitation on the sellers' rights have been fulfilled and the sellers made an attempt to comply with the Code's terms. Reason and logic mandate that we not require a futile gesture on behalf of the sellers to reclaim their cattle when it had already lost its identity. The right to reclaim under § 2.502, we think, has been properly preserved.

II.

Having concluded that as between the seller and buyer, the seller is entitled to prevail, we turn to the sellers' rights as against the finance corporation. Relying basically on Article 9 provisions that outline priorities between perfected and unperfected security interests, C.I.T. first argues that any attempt by the sellers to retain title to the goods merely reserves an unperfected security interest and that this unperfected interest is subordinate to its perfected security interest covering Samuels' after-acquired property. Texas Business and Commerce Code, § 9.301(a)(1) (1968); *see* Hogan, Unperfected Security Interests and the Floating Lien, 44 Tex.L.R. 713, 714 (1966).

It is true that § 2.401(a) of the Code modifies an attempt to retain title to the retention of an unperfected security interest in the goods. And, indeed, if this interest was the only interest of the sellers, the application of Article 9 provisions would seem to cut off the sellers' rights. But closer examination of the Code provisions and the Code's underlying philosophy leads to the conclusion that these provisions do not contemplate a situation in which the sale is for cash and thus do not control the outcome of the litigation at hand.

Section 2.401(a) deals with the situation in which the seller of goods attempts to retain title to the goods, but the sale is nevertheless a credit transaction, not cash. A common example of this type of transaction is when goods are sold to a buyer, and the buyer is

obligated to make periodic payments for the goods. Title to the goods, however, is not supposed to pass to the buyer until the last payment is made at the end of the term. *See* The Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N.E. 225 (1925).

[16] But this simply is not the case when a sale is made for cash. In a cash sale the seller believes, and not unreasonably, that he has his payment in hand. The only phase of the transaction left uncompleted is the seller's cashing the check. All he has to do is put the check in the mail and wait for it to be cleared at the bank, or take the check directly to the bank and cash it. Because the limited time sequence, extending from the receipt of the check to its being cashed, is so short, it would be unreasonable to require the cash seller to follow the litany of the Code and take measures to perfect an alleged security interest. *See* Corman, Cash Sales, Worthless Checks and the Bona Fide Purchaser, 10 Vanderbilt L.R. 55, 65 (1965).

[17, 18] Presumably, any shifting of the loss from the purchaser to the seller that might be contemplated by the Code is based on the Code's provisions that authorize the seller to follow the prescribed steps and protect himself against loss. But because of the limited time sequence involved, the seller does not have the opportunity to protect himself. It would take more time and effort to protect his interest under the Code than to simply collect on the check. The reasons for limiting a seller's interest to an unperfected security interest simply do not exist in the cash sale transaction.[4]

[19] Supporting the conclusion that the seller's rights are not cut off under Article 9 are the explicit provisions of the Code. Section 9.102 and the accompanying comments broadly define the scope of Article 9, but carefully limit its application to commercial transactions in which the parties intend to create security interests. As found by the referee, and it has not been contested in this court, each of the cattle sellers involved in this litigation regarded the sale to Samuels as a cash transaction, and there is nothing in the record to suggest that any of the parties involved thought it was anything but a cash sale. Selling goods on a credit basis involved the assumption of a far greater risk on the part of the seller than when the goods are sold for cash. To summarily label these sellers as holders of unperfected security interests would change entirely the nature of the transaction as it was intended by the parties, and alter the cash seller's status to one who thinks he has full payment for his goods to one in which he stands as a mere unsecured creditor. The Code was designed to supplement the agreement between the parties in commercial transactions where the parties failed to provide, not completely change the character of an existing relationship. *See* Bunn, Freedom of Contract Under the Uniform Commercial Code, 2 B.C.Ind. & Com.L.R. 59 (1960); J. White and R. Summers, The Uniform Commercial Code 6 (1972).

[20] Even assuming the validity of C.I.T.'s argument that the sellers have only an unperfected security interest that is subordinate to their perfected interest, the finance corporation is still not entitled to prevail over the sellers. In order for C.I.T. to have a valid security interest in the cattle, three fundamental requirements must be met. First, the debtor and creditor must enter into an agreement and that agreement must be reduced to writing. The record is clear that C.I.T. had been financing Samuels' operations at least since 1963 and had a security interest in Samuels' assets and inventory. Second, the creditor must give value. The Code makes clear that an antecedent debt will constitute value. Third, the debtor must acquire rights in the collateral to which the lien can attach. It is with respect to the third element making up an enforceable security interest that gives rise to the difficulty in the case at hand.

[21] Less than absolute ownership of goods has been deemed by the courts to be sufficient rights in property to which a lien on after-acquired property can attach. Although the location of title to the goods generally does not determine the rights of the parties, the Code provides that the title to goods follows their possession. Consequently if the presence of title made any difference, which it does not, title would seem to be in the debtor Samuels. In addition to possession of the cattle, Samuels had other rights incident to mere possession such as the right to begin slaughtering the cattle and processing and packaging the meat.

[22] But even assuming that the debtor had sufficient rights in the collateral to which C.I.T.'s lien attached, C.I.T.'s rights in the collateral, like the rights of the debtor, were only conditional. Since the Code provides that the rights of the creditor stem from the debtor's obtaining rights in the collateral, it seems that the creditor's rights are derived from, and are no greater than, the rights of the debtor. J. White and R. Summers, The Uniform Commercial Code 795 (1968). When the debtor's rights in the collateral are only conditional, the rights of the creditor are also so limited. The only source of rights upon which Samuels could rely to claim any rights in the goods, including mere possession, was the contract of purchase between itself and the sellers. When Samuels failed to fulfill its part of the bargain by not paying, this contractual relationship came to an end, and thus Samuels had absolutely no right to retain or dispose of the merchandise. Since under Texas law the debtor had only a defeasible interest in the property that was terminated when it failed to pay, the lienholder's right, derived solely from the rights of the debtor, also terminated.

4. In the event that a conflict among secured interest holders arises, the Code clearly provides that generally the unperfected interest will always be subordinate to the perfected interest. The only exception to this rule is the purchase money security interest. When the transaction involves inventory, the Code gives this particular interest priority over the perfected lien if, and only if, the holder perfects its interest when the buyer takes possession of the goods and the seller gives notice to the financier. Texas Business and Commerce Code, §§ 9.312(c)(1)–(2) (1968); Hogan, Unperfected Security Interests and the Floating Lien, 44 Tex.L.R. 713, 720 (1966).

But these requirements just further demonstrate the impracticality of requiring a cash seller to take steps to perfect and protect his interest in the goods sold. Plainly the cash seller need only cash his check and his interests are totally and undeniably protected, rather than follow the often confusing and more demanding provisions of the Code. Moreover, because at least some of the sellers delivered their cattle immediately prior to Samuels filing a petition for bankruptcy, it was practically impossible for them to comply with the requirements of the Code before Samuels closed its doors and C.I.T. asserted its claims to the cattle. Because of the impracticality demonstrated by an analysis of these provisions in light of the limited element, we do not think that the Code intended to limit the cash seller's rights only to an unperfected security interest and subject the seller to the consequences of holding such an undesirable interest.

[23] This is not to say that a security interest cannot continue to exist with respect to collateral in the event that the debtor sells, exchanges or otherwise disposes of the goods. Texas Business and Commerce Code, § 9.306(b) (1968). This extension of a secured party's rights in goods contemplates a sale or disposition to a fourth party. It does not anticipate a termination of the right of a debtor in goods with respect to the source from which the debtor procured the goods.

This general approach to the provisions of the Code was set forth in In re Mort, 208 F.Supp. 309 (E.D.Pa., 1962), and the reasoning of that case, although subject to some disagreement, has been reaffirmed by courts and commentators alike. In re Helms Veneer Corp., *supra;* In re Lindenbaum's, Inc., 2 U.C.C.Rep. 495 (E.D.Pa., 1964); Greater Louisville Auto Auction v. Ogle Buick, Inc., *supra;* Countryman, Buyers and Sellers of Goods in Bankruptcy, 1 N.M.L.R. 435, 447, n. 63 (1971); *see* International Harvester Credit Corp. v. America Nat'l Bank, 296 So.2d 32 (Fla., 1974); Braucher, Reclamation of Goods from a Fraudulent Buyer, 65 Mich.L.R. 1281 (1967). *But see,* In re Hayward Woolen Co., 3 U.C.C.Rep. 1107 (Referee in Bankruptcy 1967); Guy Martin Buick v. Colorado Springs Nat'l Bank, 32 Colo.App. 235, 511 P.2d 912 (1973); Evans Products Co. v. Jorgensen, 245 Or. 362, 421 P.2d 978 (1966). In *Mort* the petitioner sought reclamation of goods that he delivered to the bankrupt two days before bankruptcy. The bankrupt had issued a check in payment for the goods, but because of the intervening bankruptcy, the check was dishonored. The court found that the sale was for cash and, relying on §§ 2–507(2) and 2–511, concluded that the unpaid seller of the goods had the right to reclaim them. Even without regard to whether the lienholder's rights had attached to the property, the court held that the seller's right to reclaim was superior to the rights of any creditor, including the rights of the trustee in bankruptcy. Likewise, the unpaid seller's rights to reclaim in the instant case are superior to the unattached lien of C.I.T.

III.

[24] The third question is whether C.I.T. qualifies as a good faith purchaser. Under § 2.403 of the Code, the buyer of goods from a seller is vested with a limited interest that it can convey to a good faith purchaser and thus create in the purchaser a greater right to the goods than the buyer itself had. This is possible even when the buyer obtains the goods as a result of giving a check that is later dishonored or when the purchase was made for cash. But in order to attain this status, the proponent must be a *purchaser* that gives *value* and acts in *good faith.* While C.I.T. gave value for the goods within the meaning of the Code, it failed to meet the test of a purchaser or one acting in good faith.

[25] With regard to C.I.T.'s status as a purchaser, the Code broadly defines this term as one who take "by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property." Texas Business and Commerce Code, § 1.201(32) (1968); *see id.* § 1.201(33). As noted earlier, C.I.T. does not have an interest in the cattle because its rights in the collateral are derivative of its debtor's rights in it. When Samuels failed to pay for the cattle, its rights in the cattle terminated and thus so did C.I.T.'s. C.I.T.'s status as a good faith purchaser is also defeated with regard to its acting in good faith. The Code defines good faith as "honesty in fact in the conduct or transaction concerned." Texas Business and Commerce Code, § 1.201(19) (1968). Implicit in the term "good faith" is the requirement that C.I.T. take its interest in the cattle without notice of the outstanding claims of others. *See* Greater Louisville Auto Auction v. Ogle Buick, Inc., *supra,* 387 S.W.2d at 21. *See also* Fidelity and Casualty Co. v. Key Biscayne Bank, 501 F.2d 1322, 1326 (5th Cir. 1974).

It is true that the evidence does not reveal any breach of an express obligation on C.I.T.'s behalf to continue financing the packing house after Samuels filed a petition in bankruptcy. Nor does the good faith element require the creditor to continue to finance the operation of a business when it is apparent that the business is unprofitable and is going bankrupt. But because of the integral relationship between C.I.T. and Samuels, we do not see how C.I.T. could have kept from knowing of the outstanding claims of others. C.I.T. maintained close scrutiny over the financial affairs of Samuels' operations. C.I.T. had been financing Samuels' packing house operations for at least six years, and the financing involved the flow of millions of dollars. The amount of cash advances made to Samuels was not predetermined or determined arbitrarily, but was calculated only after C.I.T. examined weekly the outstanding accounts and the current inventory of the business. From such a continuous and prolonged study of the business to determine the amount of each weekly advance, C.I.T. must have been intricately aware of the operations and financial status of the business.

[26] Since C.I.T. was so intimately involved in Samuels' financial affairs, it must have known that when it refused to advance additional funds, unpaid checks issued to cattle sellers by Samuels would be dishonored. Samuels' operations were totally dependent on the financing of C.I.T. and both parties knew it. From its enduring involvement in the weekly financing, C.I.T. apparently knew that Samuels was purchasing and processing cattle up until the very time of filing the petition. Knowing that cattle had been purchased and processed immediately preceding its refusal to advance more money, C.I.T. must have known as a result of this refusal that some cattle sellers who had recently delivered their cattle to Samuels would not be paid. Because C.I.T. and Samuels were so intertwined in the management of the financial affairs of the business, we do not think that C.I.T. can plausibly claim, in complete honesty, that it was unaware of the claims of the unpaid cattle sellers. Since C.I.T. was aware of these outstanding claims, it does not qualify as a good faith purchaser.

IV.

[27] We now turn to the unpaid cattle sellers' rights as against the trustee in bankruptcy. It is true that under § 70c of the Bankruptcy Act the trustee, as a hypothetical lien creditor, will cut off the rights of the sellers as holders of unperfected security interests. But as pointed out earlier, the sellers' rights are not limited merely to the retention of an unperfected security interest, for they also have the right to reclaim the cattle. Thus the question becomes whether the trustee's lien gives him a priority of interest in the proceeds of sale of the cattle as against the sellers' rights to reclaim.

Turning again to § 2.507 of the Code in order to define the sellers' rights, we see that the section and accompanying

comments implicitly give the sellers the right to reclaim, but it expressly subordinates that right only to a good faith purchaser. There is no mention of a subordination of the reclamation rights to the trustee in bankruptcy, nor is there any suggestion in this provision, the following comments, or otherwise that the drafters of the Code intended that the sellers' right to reclaim be so subordinated. Indeed, in view of the historical developments leading to the drafting and subsequent amendment of § 2.705, an analogous provision which deals solely with credit sales and not cash, irresistible logic compels the conclusion that the Code draftsmen intended for the sellers' reclamation rights to prevail over the trustee's lien.

When § 2.705 was originally written, it spelled out that a seller's right to reclaim was subordinate to "a buyer in ordinary course or other good faith purchaser or lien creditor . . . ." Texas Business and Commerce Code, § 2.702(c) (1968). Construing this provision, the Third Circuit in In re Kravitz, 278 F.2d 820 (1960), held that a trustee in bankruptcy fell within the definition of lien creditor. Since the Code did not set out the priorities of a lien creditor as against the seller's right to reclaim, the court turned to Pennsylvania law and concluded that under the law of that state, the lien creditor should prevail. Consequently the sellers' attempts to reclaim their property were unsuccessful.

Kravitz and its implications have been widely discussed. Peters, Remedies for Breach of Contracts Relating to the Sale of Goods under the Uniform Commercial Code: A Road Map for Article 2, 73 Yale L.J. 199, 219, n. 64 (1963). Although the permanent editorial board in 1962 rejected a proposed amendment to § 2.702 based on the *Kravitz* decision that would have deleted the words "lien creditor," the board in 1966 adopted the amendment and deleted this party as one to which reclamation rights would be subordinated. J. White and R. Summers, The Uniform Commercial Code, 243 (1972). This amendment, obviously thoroughly considered, amply demonstrates that the provisions of the Code were not intended to subordinate the sellers' reclamation rights to those of the trustee in bankruptcy.

But even assuming the continuing vitality of *Kravitz*, that decision does not control the outcome of this litigation. The litigants in *Kravitz* dealt on the basis of a credit transaction and thus § 2.703, dealing solely with credit transactions, defined the rights of the sellers as against the trustee in bankruptcy. Under the facts of the instant case, however, we are concerned with a cash sale, and thus the sellers' rights are defined by § 2.507. Nowhere in that provision, the accompanying comments, or the law of Texas, is the sellers' rights to reclaim subordinated to a lien creditor or a trustee in bankruptcy. The sellers' right to reclaim having been properly preserved, the cattle farmers are entitled to exercise it now.

V.

We believe it inequitable to deny the claims of the stock farmers who produced and delivered the cattle, in favor of the mortgagee who refused to advance the money before bankruptcy. We adhere to the teachings of Bank of Marin v. England, 385 U.S. 99, 103, 87 S.Ct. 274, 277, 17 L.Ed.2d 197 (1966):

> "* * * There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction. Section 2a, 52 Stat. 842, 11 U.S.C. § 11(a); Pepper v. Litton, 308 U.S. 295, 304–305 [60 S.Ct. 238, 84 L.Ed. 281]; Securities & Exchange Commission v. United States Realty & Imp. Co., 310 U.S. 434, 455 [60 S.Ct. 1044, 84 L.Ed. 1293.] We have said enough to indicate why it would be inequitable to hold liable a drawee who pays checks of the bankrupt duly drawn but presented after bankruptcy, where no actual revocation of its authority has been made and it has no notice or knowledge of the bankruptcy. The force of §§ 70d(5) and 18f can be maintained by imposing liability on the payee of the checks if he has received a voidable preference or other voidable transfer. The payee is a creditor of the bankrupt, and to make him reimburse the trustee is only to deprive him of preferential treatment and to restore him to the category of a general creditor. To permit the trustee under these circumstances to obtain recovery only against the party that benefited from the transaction is to do equity."

It is our firm belief that the approach to the Code outlined above is eminently reasonable and conforms with the Code's express provisions and underlying policies. We do not believe that the drafters of the Code intended for the unpaid sellers to walk away from this transaction with nothing, neither their goods nor the purchase price, while the mortgagee enjoys a preferred lien on that for which it refused to advance payment. Based on our understanding of the Code, such a result is insupportable.

We again reverse the judgment of the district court.

1. Ch. 9, Tex.Bus. & C.Code. All citations and references to the U.C.C. are to the Code as adopted in Texas.

IN RE SAMUELS & CO., INC.

GODBOLD, Circuit Judge (dissenting):

I dissent.

This case raises one primary question: under the Uniform Commercial Code as adopted in Texas, is the interest of an unpaid cash seller in goods already delivered to a buyer superior or subordinate to the interest of a holder of a perfected security interest in those same goods? In my opinion, under Article Nine,[1] the perfected security interest is unquestionably superior to the interest of the seller. Moreover, the perfected lender is protected from the seller's claims by two independent and theoretically distinct Article Two provisions. My result is not the product of revealed truth, but rather of a meticulous and dispassionate reading of Articles Two and Nine and an understanding that the Code is an integrated statute whose Articles and Sections overlap and flow into one another in an effort to encourage specific types of commercial behavior. The Code's overall plan, which typically favors good faith purchasers,[2] and which encourages notice filing of nonpossessory security interests in personalty through the imposition of stringent penalties for nonfiling, compels a finding that the perfected secured party here should prevail.

My brothers have not concealed that their orientation in the case before us is to somehow reach a result in favor of the sellers of cattle, assumed by them to be "little fellows," and against a large corporate lender, because it seems the "fair" thing to do. We do not sit as federal chancellors confecting ways to escape the state law of commercial transactions when that law produces a result not to our tastes. Doing what

2. See, e. g., §§ 2.403; 3.302, 3.305; 6.110; 7.501, 7.502; 8.301, 8.302; 9.307; 9.309.

seems fair is heady stuff. But the next seller may be a tremendous corporate conglomerate engaged in the cattle feeding business, and the next lender a small town Texas bank. Today's heady draught may give the majority a euphoric feeling, but it can produce tomorrow's hangover.

I. Rights under § 2.403

My analysis begins with an examination of the relative rights of seller and secured party under § 2.403(a).

Section 2.403 gives certain transferors power to pass greater title than they can themselves claim. Section 2.403(a) gives good faith purchasers of even fraudulent buyers-transferors greater rights than the defrauded seller can assert. This harsh rule is designed to promote the greatest range of freedom possible to commercial vendors and purchasers.

The provision anticipates a situation where (1) a cash seller has delivered goods to a buyer who has paid by a check which is subsequently dishonored, § 2.403(a)(2), (3), and where (2) the defaulting buyer transfers title to a Code-defined "good faith purchaser." The interest of the good faith purchaser is protected *pro tanto* against the claims of the aggrieved seller. §§ 2.403(a); 2.403, Comment 1. The Code expressly recognizes the power of the defaulting buyer to transfer good title to such a purchaser even though the transfer is wrongful as against the seller. The buyer is granted the *power* to transfer good title despite the fact that under § 2.507 he lacks the *right* to do so.

The Code definition of "purchaser" is broad, and includes not only one taking by sale but also covers persons taking by gift or by voluntary mortgage, pledge or lien. § 1.201(32), (33). It is therefore broad enough to include an Article Nine secured party. §§ 1.201(37); 9.101, Comment; 9.102(a), (b). Thus, if C.I.T. holds a valid Article Nine security interest, it is by virtue of that status *also* a purchaser under § 2.403(a). *See* First Citizens Bank and Trust Co. v. Academic Archives, Inc., 10 N.C.App. 619, 179 S.E.2d 850 (1971); Stumbo v. Paul B. Hult Lumber Co., 251 Or. 20, 444 P.2d 564 (1968); In re Hayward Woolen Co., 3 U.C.C. Rep. 1107 (D.Mass., 1967).

While I shall discuss in detail *infra*, the implications of C.I.T.'s security interest under Article Nine and under other Article Two provisions, I here note that C.I.T. is the holder of a perfected Article Nine interest which extends to the goods claimed by the seller Stowers.

Attachment of an Article Nine interest takes place when (1) there is agreement that the interest attach to the collateral; (2) the secured party has given value; and (3) the debtor has rights in the collateral sufficient to permit attachment. § 9.204(a).

(1) *The agreement:* In 1963, Samuels initially authorized C.I.T.'s lien in its after-acquired inventory. The agreement between these parties remained in effect throughout the period of delivery of Stowers' cattle to Samuels.

(2) *Value:* At the time of Stowers' delivery, Samuels' indebtedness to C.I.T. exceeded $1.8 million. This pre-existing indebtedness to the lender constituted "value" under the Code. § 1.201(44).

(3) *Rights in the collateral:* Finally, upon delivery, Samuels acquired rights in the cattle sufficient to allow attachment of C.I.T.'s lien. The fact that the holder of a voluntary lien—including an Article Nine interest—is a "purchaser" under the Code is of great significance to a proper understanding and resolution of this case under Article Two and Article Nine. The Code establishes that purchasers can take from a defaulting cash buyer, § 2.403(a). Lien creditors are included in the definition of purchasers, § 1.201(32), (33). A lien *is* an Article Nine interest, §§ 9.101, Comment; 9.102(b); 9.102, Comment. The existence of an Article Nine interest presupposes the debtor's having rights in the collateral sufficient to permit attachment, § 9.204(a). Therefore, since a defaulting cash buyer has the power to transfer a security interest to a lien creditor, including an Article Nine secured party, the buyer's rights in the property, however marginal, must be sufficient to allow attachment of a lien. And this is true even if, *arguendo*, I were to agree that the cash seller is granted reclamation rights under Article Two. *See* First National Bank of Elkhart Cty. v. Smoker, 11 U.C.C. Rept.Serv. 10, 19 (Ind. Ct.App., 1972); Evans Products Co. v. Jorgensen, 245 Or. 362, 421 P.2d 978 (1966).

If the Article Nine secured party acted in good faith, it is prior under § 2.403(a) to an aggrieved seller. Under the facts before us, I think that C.I.T. acted in good faith. The Code good faith provision requires "honesty in fact", § 1.201(19), which, for Article Two purposes, is "expressly defined as . . . reasonable commercial standards of fair dealing." §§ 1.201, Comment 19; 2.103(a)(2). There is no evidence that C.I.T. acted in bad faith in its dealings with Samuels, or that Stowers' loss resulted from any breach of obligation by C.I.T. There is no claim that the 1963 security agreement was the product of bad faith. The lender's interest had been perfected and was of record for six years when Stowers' delivery to Samuels occurred. There is no suggestion that the $1.8 million debt owing from Samuels to C.I.T. was the result of bad faith or of a desire to defeat Stowers' $50,000 claim. There is no claim that C.I.T. exercised or was able to exercise control over Samuels' business operations. There is no evidence that C.I.T. authorized or ordered or suggested that Samuels dishonor Stowers' check. There is no contention that C.I.T.'s refusal to extend credit on May 23, the date Samuels filed a voluntary petition on bankruptcy at a time when it owed C.I.T. more than $1.8 million, was violative of an obligatory future advance clause. The Code's good faith provision requires "honesty in fact", § 1.201(19); it hardly requires a secured party to continue financing a doomed business enterprise.

The majority deny that C.I.T. acted in good faith because, they claim, the lender had "intimate" knowledge of Samuels' business operations. The majority's source of information on the scope of C.I.T.'s knowledge is a little puzzling. The Referee in Bankruptcy found only that "C.I.T. knew or should have known of the manner by which the bankrupt bought livestock . . . on a grade and yield basis." In the Matter of Samuels & Co., Inc., No. BK 3-1314 (N.D. Tex. order of Jan. 19, 1972). This factual finding was affirmed by the District Court which reversed the Referee and upheld C.I.T.'s priority over Stowers. *Id.*, orders of Nov. 24, 1972, and Jan. 16, 1973. Neither the Referee nor the District Court found, nor have the parties alleged, that C.I.T.'s knowledge of Samuels' business extended to knowledge of the debtor's obligations to third party creditors.

However, even if evidence had established that C.I.T. knew of Samuels' nonpayment and of Stowers' claim, C.I.T.'s status as an Article Two good faith purchaser would be unaffected. Lack of

knowledge of outstanding claims is necessary to the common law BFP, and is similarly expressly required in many Code BFP and priority provisions. *See e. g.*, §§ 3.302; 6.110; 8.301, 8.302; 9.301(a)(2). But the Code's definition of an Article Two good faith purchaser does not expressly or impliedly include lack of knowledge of third-party claims as an element. The detailed definition of the Article's counterpart of the common law BFP requires only honesty in fact, reasonable commercial behavior, fair dealing. And this describes precisely C.I.T.'s dealings with Samuels: during the period May 13–22—the time when the bulk of Stowers' cattle were delivered and the time of the issuance of the NSF checks—C.I.T.'s advances to Samuels totalled $1 million. The advances were curtailed on May 23 because of Samuels' taking voluntary bankruptcy at a time when its indebtedness to C.I.T. was enormous. The decision to terminate further funding was clearly reasonable. It was also fair, and honest, and, as the majority have failed to grasp, was not the cause of Stowers' suffering. As I note *infra* in my analysis of rights under Article Nine, the sellers' loss was avoidable through perfection of their security interests in the cattle. If they had perfected, they would not only have been prior to C.I.T. as an Article Nine lender, § 9.312, but also protected against C.I.T. as an Article Two purchaser, § 9.201. As it happens, Stowers did not perfect. I believe the sellers cannot now be permitted to force an innocent, if prosperous, secured creditor to shoulder their loss for them.

II. Rights under § 2.507

The majority opinion devotes much of its concentration and energy to an analysis of the sellers' "reclamation right" under § 2.507 and § 2.702. Relying on an expansive reading of these Sections, the opinion concludes that a cash seller whose right to payment is frustrated through a check ultimately dishonored can "reclaim" proceeds of goods delivered to the buyer despite an interim third-party interest, and despite a year-long delay in seeking reclamation. I am unable to accept this reading of Code policy and requirements.

Although the Code expressly grants a credit seller the right and power to reclaim goods from a breaching buyer, the right is triggered only by specific and limited circumstances; it can be asserted only if an exacting procedure is followed; and the right can never be asserted to defeat the interests of certain third parties who have dealt with the defaulting buyer. § 2.702(b), (c). There is no Code Section expressly granting a similar reclamation right to a cash seller.

The seller's remedies upon breach are enumerated in § 2.703. These provisions do not include or suggest a right or power in a cash seller to recover goods already delivered to a breaching buyer. Nevertheless the courts have read a reclamation right into the Code. It is this judicially-confected right to reclaim goods in which the majority's reclamation analysis is grounded. However, the majority take the reclamation right beyond anything intimated by the Code or heretofore permitted by courts recognizing a cash seller's reclamation right.

The cash seller's right to reclaim has been drawn from the language of § 2.507(b) and § 2.507, Comment 3. I note, first, that the remedy granted by § 2.507(b) is one of seller against buyer, *see* In re Helms Veneer Corp., 287 F.Supp. 840 (W.D.Va., 1968). It does not concern rights of seller against third parties. Section 2.507, Comment 3 explains that the seller's rights under § 2.507 must "conform with the policy set forth in the bona fide purchase section of this Article," i. e., with § 2.403. As I have noted above, under this provision the rights of an aggrieved cash seller are subordinated to those of the buyer's good-faith purchasers, including Article Nine lenders such as C.I.T. Thus, the Code provisions supporting a cash seller's reclamation right expressly preclude recovery by Stowers as against C.I.T. See §§ 2.507(b); 2.507, Comment 3; 2.702(b), (c). *See also* Stumbo v. Paul B. Hult Lumber Co., 251 Or. 20, 444 P.2d 564 (1968); In re Hayward Woolen Co., 3 U.C.C.Rep. 1107 (D.Mass., 1967); Evans Products Co. v. Jorgensen, 245 Or. 362, 421 P.2d 978 (1966).

Moreover, those courts which have permitted reclamation under § 2.507 have invariably adhered to § 2.507, Comment 3's express requirement that demand for return be made within ten days after receipt by the buyer or else be lost. *See* In re Colacci's of America, Inc., 490 F.2d 1118 (CA 10, 1974); In re Helms Veneer Corp., *supra;* Stumbo v. Paul B. Hult Lumber Co., *supra;* In re Mort, 208 F.Supp. 309 (E.D.Pa., 1962).

In the instant case, demand was not made within ten days or ten weeks; it came a full year after delivery to Samuels. The majority excuse this gross noncompliance by finding that the sellers' failure was the product of innocent error, and, in any event, was not required since the "purpose" of the demand rule—protection of purchasers of the delivered goods—was served through C.I.T.'s alleged intimate knowledge of Samuels' business operations.

The Code's ten-day provision is an absolute requirement. There is no exception in the Code Sections or Comments, express or implied, to the statutory period. I would be hesitant to read any extension into a statute of limitations clear and unambiguous on its face, and particularly unwilling to allow an extension some 36 times greater than the statutory maximum. My reluctance is all the greater where the right at issue is not granted by the Code but is rather the product of judicial interpretation of a Comment which, whatever grant of power it may suggest, expressly limits that right to a ten-day life.

The spirit in which the rule was broken seems to me irrelevant. Even conceding that Stowers' noncompliance occurred in absolute good faith, it was nonetheless noncompliance. Mistake of law does not constitute excuse of mistake.

C.I.T.'s apocryphal intimate knowledge of Samuels' business operations is, I believe, also irrelevant to a determination of the validity of Stowers' claim. The majority find the purpose of the ten-day rule to be one of notice to third parties that a claim exists. I have somewhat greater difficulty than my brothers in pinpointing the purpose of the ten-day rule. But I am convinced that the goal is not one of protection or notice to third-party purchasers, for their rights are secure under the Code as against the aggrieved seller even if demand is timely made. §§ 2.507, Comment 3; 2.702(c). The Code does not condition the purchasers' rights on a lack of knowledge of the seller's interest. With or without knowledge, the purchaser rests secure. I am therefore forced to conclude that the ten-day rule serves some function other than notifying third-party takers, and, consequently, that even if C.I.T. knew of Stowers' claim, the sellers' obligation under the ten-day rule would not have been excused. And even if knowledge by the purchaser suspended the sellers'

duty to make a timely demand, the record in this case is devoid of any hint that C.I.T. knew of Samuels' breach and Stowers' reclamation right.

Moreover, § 2.507 and § 2.702 speak of a right to reclaim goods. Neither provision grants a right to go after proceeds of those goods. Where a right or interest in proceeds is recognized by the Code it is recognized expressly. *See e. g.*, § 9.306. The right granted by § 2.507 is narrowly defined. I am unwilling to imply an extension to such a short-lived and precisely drawn remedy.

Finally, even if there were a right to reclaim proceeds, even if the right had been timely exercised, and even if it could have been exercised despite the transfer of interest to C.I.T., Stowers would have taken subject to C.I.T.'s perfected Article Nine interest. See §§ 9.201, 9.301, 9.306, 9.312. *See also* my discussion of C.I.T.'s rights and interest under Article Nine, *infra*.

III. Rights under § 2.511

The majority opinion states that C.I.T.'s interest cannot be found superior to Stowers' because such a finding would violate § 2.511's prohibition on penalizing a seller for accepting as payment a check which is ultimately dishonored. I believe the majority have misconstrued the scope and significance of § 2.511.

Like § 2.507, § 2.511 concerns claims of the seller as against the buyer. See § 2.511(c), § 2.511, Comment 4. On its face it does not affect the rights of third parties taking from the defaulting buyer. Moreover, and more important, the seller is not here "penalized" for taking an N.S.F. check. Such loss as Stowers suffered is the direct result of his failure to comply with Code provisions which, once followed—and regardless of Stowers' acceptance of Samuels' check—would have made his interest invulnerable to claims by C.I.T. *See, e. g.*, §§ 9.107; 9.201; 9.301; 9.312(c).

IV. Rights under Article Nine

I am also unable to agree with the majority's conclusion that, under the Code, Stowers' interest is different from and greater than a security interest. Similarly, I disagree with the theory that by virtue of Stowers' power under Article Two, C.I.T.'s security interest is subject to defeat since it (1) could not attach because the debtor's rights in the collateral were too slight to permit attachment and (2) was subject to defeat even if it attached because a security interest collapses if the debtor's right to the property is extinguished. The majority's result is achieved only by ignoring or circumventing the plain meaning of Article Nine and Article Two.

Prior to the enactment of the Uniform Commercial Code, seller and buyer could agree that, despite buyer's possession, title to goods sold was to remain in the seller until he was paid. Such a reservation of title under the "cash sale" doctrine would defeat not only a claim to the goods by the defaulting buyer, but also the claims of lien creditors of the buyer, for the buyer's naked possession could give rise to no interest to which a lien could attach.

However, the U.C.C. specifically limits the seller's ability to reserve title once he has voluntarily surrendered possession to the buyer: "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." § 2.401(a). *See also* § 1.201(37). The drafters noted the theory behind this provision: "Article [Two] deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed." § 2.401, Comment 1.

The majority opinion interprets § 2.401(a) as applying only to "credit" sales, and of no effect where the parties have contracted a "cash" sale. However, the Code provision speaks of "any reservation of title." It does not on its face apply solely to credit sales. There is no authority under the Code for the majority's restrictive interpretation. Numerous courts have, in fact, applied § 2.401 to cash sales. *See e. g.*, Guy Martin Buick, Inc., v. Colo. Springs Nat'l Bank, 32 Colo.App. 235, 511 P.2d 912 (1973); First Nat'l Bank of Elkhart Cty. v. Smoker, 11 U.C.C.Rep. 10 (Ind.App., 1972); English v. Ford, 17 Cal.App.3d 1038, 95 Cal.Rptr. 501 (1971); Evans Products v. Jorgensen, 245 Or. 362, 421 P.2d 978 (1966). I have been unable to find even one case suggesting that § 2.401 applies only to credit sales.

If the majority were correct, the Section would be merely definitional, for a credit sale is but a sales transaction in which the seller reserves a security interest. However, § 2.401 is not definitional. It is operational and concerns the effect of transfer of possession under a sales contract upon any reservation of title. Neither law nor logic leads me to believe that § 2.401 is correctly interpreted to exclude cash sales.

The majority also suggest that Stowers' interest cannot be characterized as a security interest subject to Article Nine requirements and priorities since, the majority conclude, such interests must be "consensual". While it is true that many interests governed by Article Nine are consensual, §§ 9.102; 9.102, Comment, the Code clearly subjects Article Two security interests arising not by consent but by operation of law to Article Nine. *See* §§ 2.401(a); 9.113; 9.113, Comment 2. *See also* §§ 2.326; 9.114; 9.102, Comment 1.

Since Stowers' interest upon delivery of the cattle to Samuels was limited to a security interest subject to Article Nine, §§ 2.401(a); 9.113, the validity of C.I.T.'s Article Nine interest becomes crucial. If C.I.T. is the holder of a perfected Article Nine interest in the collateral claimed by Stowers through its unperfected § 2.401 interest, C.I.T.'s interest will prevail over Stowers, § 9.312(e).

The majority assert that C.I.T. cannot claim an interest in the cattle because Samuels' interest was too slight to permit attachment. *See* § 9.204(a). As I noted in my discussion of rights under § 2.403, this argument ignores the significance of § 2.403(a) and § 1.201(32), (33). The Code anticipates a situation where the interest of an unpaid cash seller who has delivered goods to a breaching buyer is subordinated to the interest of "purchasers" of the buyer. Lien creditors are included in the definition of "purchasers"; in order that there *be* lien creditors, the buyer's interest must be great enough to allow attachment. Therefore, however Samuels' interest upon delivery of the cattle is defined, and however slight or tenuous or marginal it was, it was necessarily great enough to permit attachment of a lien, including C.I.T.'s Article Nine interest.

The majority find that even if attachment occurred, C.I.T.'s interest would be defeated by Stowers' reclamation. The theory behind this argument is that the rights of the Article Nine secured party are at best coextensive with the rights of the debtor; if the debtor loses his rights, the security interest too is lost.

Upon nonpayment Samuels lost the right to retain or dispose of the property, but the Code recognizes that the breaching buyer had the power to encumber, despite nonpayment, so long as he retained possession. §§ 2.403(a); 1.201(32), (33). In the instant case, this power arose as a result of Stowers' delivery, and it did not terminate while the goods remained in Samuels' hands. The whole point of Article Nine is the continuity of perfected security interests *once they have properly attached,* despite subsequent loss of control or possession of the collateral by the debtor. § 9.201. Article Nine does not except an unpaid cash seller from this overall plan. In fact it specifically provides a means for him to perfect and become prior to previous perfected security interests. § 9.312(c), (d).

To hold that a reclaiming seller is given the power to sweep away a security interest which was able to attach only as a direct and Code-approved result of his voluntary act of delivery to the buyer would require ignoring the meaning and interplay of Article Two and Article Nine. Article Two recognizes the continuous vitality and priority of an Article Nine interest over the rights of an aggrieved seller. *See* §§ 2.403(a); 2.507, Comment 3; 2.702(c). It would be error to believe that a proper analysis of Article Nine could require the extinction of an identical Article Nine interest in the very circumstances specified by Article Two as triggering the priority of lienor over seller. *See* §§ 2.403(a); 2.507(b); 2.507, Comment 3; 2.702(b), (c); 9.102; 9.107(1); 9.312(c), (d).

Any seeming unfairness to Stowers resulting from the Code's operation is illusory, for the sellers could have protected their interests, even as against C.I.T.'s prior perfected interest, if they had merely complied with the U.C.C.'s purchase-money provisions. §§ 9.107, 9.312(c), (d). The Code favors purchase-money financing, and encourages it by granting to a seller of goods the power to defeat prior liens. The seller at most need only (1) file a financing statement and (2) notify the prior secured party of its interest before delivery of the new inventory. The procedure is not unduly complex or cumbersome. But whether cumbersome or not, a lender who chooses to ignore its provisions takes a calculated risk that a loss will result.

In the instant case Stowers did not utilize § 9.312's purchase-money provision. The sellers never perfected. Thus, in a competition with a perfected secured party they are subordinated, and, in this case, lose the whole of their interests. *See* §§ 9.201, 9.301, 9.312(e).

V. Rights under the Bankruptcy Act

C.I.T.'s perfected security interest is not subject to defeat by the Trustee in Bankruptcy Mahon. If, however, C.I.T. were to have abandoned its claim against Samuels, Stowers would nonetheless have lost in a priority contest with the Trustee.

Bankruptcy Act § 70c confers the status of a hypothetical lien creditor upon the Trustee. Mahon could assert those § 70 rights against Stowers, an unperfected secured party, and would prevail under U.C.C. § 9.301(a)(2).

Bank of Marin v. England, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966), does not strengthen Stowers' claim. In that case the drawer of a check took bankruptcy after the check had been issued but before presentment. The drawee paid on the instrument without notice or knowledge of the bankruptcy. Such payment was in compliance with U.C.C. §§ 4.303, 4.401 and 4.402. The Supreme Court found that an application of Bankruptcy Act § 70d under these circumstances would work a hardship on the payee. *Bank of Marin* has been critically attacked by scholars, *see e. g.,* 4A Collier on Bankruptcy, § 70.68 at 755 (14th Ed. 1971). In any event, the "inequity" in *Bank of Marin* occurred when a loss resulted from the effect of a federal statute upon good faith compliance with state statute. The federal statute's operation and effect were wholly beyond the control of the innocent drawee. In the instant case Stowers' loss resulted from his own failure to comply with state law which would have enabled him to perfect his purchase money security interest. The loss could have been avoided through his own efforts. This is not the kind of loss equity protects against.

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CORRECTED

MATTER OF SAMUELS & CO., INC.

In the Matter of SAMUELS & CO., INC., Bankrupt.

Curtis R. STOWERS et al., Appellants,

v.

James S. MAHON, Trustee, and C.I.T. Corporation, Appellees.

No. 73-1185.

United States Court of Appeals, Fifth Circuit.

Feb. 17, 1976.

In bankruptcy proceeding, sellers of cattle sought reclamation of cattle sold to the bankrupt, and also asserted a right to proceeds from the sale of the slaughtered meat. The United States District Court for the Northern District of Texas, Sara Tilghman Hughes, J., reversed referee's finding that the sellers had priority over creditor which had security interest in bankrupt's after-acquired property and sellers appealed. The Court of Appeals, 483 F.2d 557, reversed and remanded, and certiorari was granted. The Supreme Court, 416 U.S. 100, 94 S.Ct. 1626, 40 L.Ed.2d 79, reversed and remanded. The Court of Appeals, reversed. On rehearing en banc, the Court of Appeals adopted as its opinion the dissenting opinion of Godbold, Circuit Judge, holding that under the Uniform Commercial Code, the interest of an unpaid cash seller in goods already delivered to a buyer is subordinate to the interest of a holder of a perfected security interest in those same goods.

Action of the panel reversed and judgment of the district court affirmed.

Gee, Circuit Judge, specially concurring, filed opinion.

Ainsworth, Circuit Judge, with whom Bell, Ingraham, Coleman and Gewin, Circuit Judges, joined, filed dissenting opinion.

1. Trade Regulation ⇐872

Course of conduct mandated by the Packers and Stockyards Act and regulations established that sales of livestock were cash sales. V.T.C.A., Bus. & C. § 1.205(a); Packers and Stockyards Act, 1921, § 1 et seq., 7 U.S.C.A. § 181 et seq.

2. Secured Transactions ⇐138

Interest of an unpaid cash seller in goods already delivered to a buyer is subordinate to the interest of a holder of a perfected security interest in those same goods. V.T.C.A., Bus. & C. §§ 2.403, 2.507, 2.511, 9.204.

3. Sales ⇐234(5)

Section of sales article giving good faith purchasers of even fraudulent buyers transferors greater rights than the defrauded seller can assert is designed to promote the greatest range of freedom possible to commercial vendors and purchasers. V.T.C.A., Bus. & C. § 2.403(a).

4. Secured Transactions ⇐22

Cattle buyer's indebtedness in excess of 1.8 million dollars to creditor which had security interest in buyer's after-acquired property constituted "value" for purpose of determining whether attachment of an Article 9 interest took place. V.T.C.A., Bus. & C. § 9.204(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Secured Transactions ⇐13

Upon delivery of cattle to buyer whose check to sellers was subsequently dishonored, buyer acquired rights in the cattle sufficient to allow attachment of lien of creditor which had security interest in buyer's after-acquired property. V.T.C.A., Bus. & C. §§ 1.201(32), (33), 2.403(a), 9.102(b).

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6. Secured Transactions ⇐181

Since a defaulting cash buyer has the power to transfer a security interest to a lien creditor, including an Article 9 secured party, the buyer's rights in the property, however marginal, must be sufficient to allow attachment of a lien. V.T.C.A., Bus. & C. §§ 2.403(a), 9.204(a).

7. Secured Transactions ⇐138

In absence of any claim that creditor which had security interest in cattle buyer's after-acquired property acted in bad faith in its dealings with buyer, or that loss of sellers through dishonor of buyer's checks resulted from any breach of obligation by creditor, creditor was prior to aggrieved sellers under section of sales article providing that person with voidable title has power to transfer good title to a good faith purchaser for value. V.T.C.A., Bus. & C. § 2.403(a).

8. Secured Transactions ⇐184

Uniform Commercial Code's good faith provision requiring "honesty in fact" does not require a secured party to continue financing a doomed business enterprise in order to be a good faith purchaser for value. V.T.C.A., Bus. & C. § 2.403(a).

9. Secured Transactions ⇐13

Even if creditor which had security interest in cattle buyer's after-acquired property knew of buyer's nonpayment to sellers, creditor's status as an Article 2 good faith purchaser would be unaffected. V.T.C.A., Bus. & C. § 2.403.

10. Sales ⇐234(1)

Uniform Commercial Code's definition of the Article 2 counterpart of the common-law bona fide purchaser requires only honesty in fact, reasonable commercial behavior, and fair dealing. V.T.C.A., Bus. & C. § 2.103(a)(2).

11. Secured Transactions ⇐131

Right of a credit seller to reclaim goods from the breaching buyer is triggered only by specific and limited circumstances; it can be asserted only if an exacting procedure is followed, and the right can never be asserted to defeat the interests of certain third parties who have dealt with the defaulting buyer. V.T.C.A., Bus. & C. § 2.702(b, c).

12. Sales ⇐316(1)
Secured Transactions ⇐131

Cash seller's reclamation right under sales article is a remedy of seller against buyer and does not concern rights of seller against third parties and expressly precludes recovery by cash sellers as against creditor of buyer which has security interest in buyer's after-acquired property. V.T.C.A., Bus. & C. §§ 2.507(b), 2.702(b, c).

13. Sales ⇐319

Provision in sales article that demand against defaulting buyer be made within ten days after receipt by the buyer is an absolute requirement. V.T.C.A., Bus. & C. § 2.507.

14. Sales ⇐319

Even if sellers of cattle who received checks which were subsequently dishonored were in absolute good faith in failing to comply with requirement of reclamation section of sales article that demand for return be made within ten days after receipt by the buyer, noncompliance was not excused. V.T.C.A., Bus. & C. § 2.507.

15. Sales ⇐319

Even if creditor which had security interest in after-acquired property of cattle buyer knew of claim of sellers against buyer whose checks were dishon-

ored, sellers' obligation under reclamation section of sales article to make demand for return within ten days after receipt by buyer would not have been excused. V.T.C.A., Bus. & C. §§ 2.507, 2.702(c).

16. Sales ⇐317

Reclamation sections of sales article does not grant seller a right to go after proceeds of goods. V.T.C.A., Bus. & C. §§ 2.507, 2.702.

17. Secured Transactions ⇐138

Even if sellers of cattle who received checks which were subsequently dishonored had right to reclaim proceeds and had timely exercised the right, and even if right could have been exercised despite transfer of buyer's interest to creditor which had security interest in buyer's after-acquired property, sellers would have taken subject to creditor's perfected security interest. V.T.C.A., Bus. & C. §§ 9.201, 9.301, 9.306, 9.312.

18. Sales ⇐191
Secured Transactions ⇐138

Section of sales article providing that payment by check is conditional and is defeated as between the parties by dishonor of the check concerns claims of the seller as against the buyer, and did not preclude finding that lien of creditor with security interest in after-acquired property of cattle buyer whose checks were dishonored was superior to interest of sellers. V.T.C.A., Bus. & C. § 2.511.

19. Sales ⇐201(1)

Section of sales article limiting seller's ability to reserve title once he has voluntarily surrendered possession to the buyer applies to cash sales as well as credit sales. V.T.C.A., Bus. & C. § 2.401(a).

20. Secured Transactions ⇐13

However slight or tenuous or marginal cattle buyer's interest was in cattle for which buyer issued checks which were subsequently dishonored, the interest was great enough to permit attachment of lien of buyer's creditor in buyer's after-acquired property. V.T.C.A., Bus. & C. § 9.204(a).

21. Secured Transactions ⇐12

Power of cattle buyer to encumber cattle arose as a result of sellers' delivery and did not terminate while the cattle remained in buyer's hands despite dishonor of buyer's checks to sellers. V.T.C.A., Bus. & C. §§ 1.201(32), (33), 2.403(a).

22. Bankruptcy ⇐188(1)

Creditor's perfected security interest in after-acquired property of bankrupt was not subject to defeat by trustee in bankruptcy. Bankr.Act, § 70, sub. c, 11 U.S.C.A. § 110(c); V.T.C.A., Bus. & C. § 9.301(a)(2), (c).

23. Bankruptcy ⇐151

Even if creditor which has security interest in after-acquired property of cattle buyer abandoned its claim against buyer whose checks to sellers were dishonored, buyer's trustee in bankruptcy could assert status of hypothetical lien creditor against sellers. Bankr.Act, § 70, sub. c, 11 U.S.C.A. § 110(c); V.T.C.A., Bus. & C. § 9.301(a)(2), (c).

24. Sales ⇐202(2)

Loss to sellers of cattle resulting from dishonor of buyer's checks and from sellers' failure to comply with state law which would have enabled sellers to perfect purchase money security interest was not the kind of loss equity protects against.

Appeal from the United States District Court for the Northern District of Texas.

MATTER OF SAMUELS & CO., INC.

Before BROWN,* Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY and GEE, Circuit Judges. INGRAHAM,

PER CURIAM:

The action of the panel[1] is reversed and the judgment of the District Court is affirmed.

[1] The court en banc adopts as its opinion the dissenting opinion of Judge Godbold[2] with the additional comments which we set out in the margin.[3]

The judgment of the District Court is affirmed.

APPENDIX

Opinion of Circuit Judge GODBOLD (510 F.2d at 154)

I dissent.

[2] This case raises one primary question: under the Uniform Commercial Code as adopted in Texas, is the interest of an unpaid cash seller in goods already delivered to a buyer superior or subordinate to the interest of a holder of a perfected security interest in those same goods? In my opinion, under Article Nine,[1] the perfected security interest is unquestionably superior to the interest of the seller. Moreover, the perfected lender is protected from the seller's claims by two independent and theoretically distinct Article Two provisions. My result is not the product of revealed truth, but rather of a meticulous and dispassionate reading of Articles Two and Nine and an understanding that the Code is an integrated statute whose Articles and Sections overlap and flow into one another in an effort to encourage specific types of commercial behavior. The Code's overall plan, which typically favors good faith purchasers,[2] and which encourages notice filing of nonpossessory security interests in personalty through the imposition of stringent penalties for nonfiling, compels a finding that the perfected secured party here should prevail.

My brothers have not concealed that their orientation in the case before us is to somehow reach a result in favor of the sellers of cattle, assumed by them to be "little fellows," and against a large corporate lender, because it seems the

* Chief Judge Brown did not participate in the decision of this case.

1. 510 F.2d 139 (C.A.5, 1975).
2. 510 F.2d 139, 154–160 [attached hereto as an appendix].
3. In remanding the case to this court the Supreme Court left open for our determination the question of whether "a course of conduct mandated by the Act or regulations might not, just as any other course of conduct, be relevant or even dispositive under state law." *Mahon v. Stowers*, 416 U.S. 100, 113–114, 94 S.Ct. 1626, 1633, 40 L.Ed.2d 79, 89 (1974). The evidence of course of dealings, *see* Texas Business and Commercial Code, § 1.205(a), shows that the plaintiffs and Samuels had a history of dealing in the manner mandated by the Act and the regulations. That course of dealing is the basis for the view, shared by the majority members and the dissenting member of the panel, that the sales of livestock to Samuels by plaintiffs were cash sales.

   Also we note a matter not mentioned in the dissenting opinion of Judge Godbold. The District Court, which accepted the Referee's findings of fact but rejected his conclusions of law, held that C.I.T. and the trustee in Bankruptcy were good faith purchasers for value, and the Supreme Court in its opinion referred to them as such. 416 U.S. at 104, 94 S.Ct. at 1628, 40 L.Ed.2d at 84.

1. Ch. 9, Tex.Bus. & C.Code. All citations and references to the U.C.C. are to the Code as adopted in Texas.
2. See, e. g., §§ 2.403; 3.302, 3.305; 6.110; 7.501, 7.502; 8.301, 8.302; 9.307; 9.309.

"fair" thing to do. We do not sit as federal chancellors confecting ways to escape the state law of commercial transactions when that law produces a result not to our tastes. Doing what seems fair is heady stuff. But the next seller may be a tremendous corporate conglomerate engaged in the cattle feeding business, and the next lender a small town Texas bank. Today's heady draught may give the majority a euphoric feeling, but it can produce tomorrow's hangover.

I. Rights under § 2.403

My analysis begins with an examination of the relative rights of seller and secured party under § 2.403(a).

[3] Section 2.403 gives certain transferors power to pass greater title than they can themselves claim. Section 2.403(a) gives good faith purchasers of even fraudulent buyers-transferors greater rights than the defrauded seller can assert. This harsh rule is designed to promote the greatest range of freedom possible to commercial vendors and purchasers.

The provision anticipates a situation where (1) a cash seller has delivered goods to a buyer who has paid by a check which is subsequently dishonored, § 2.403(a)(2), (3), and where (2) the defaulting buyer transfers title to a Code-defined "good faith purchaser." The interest of the good faith purchaser is protected *pro tanto* against the claims of the aggrieved seller. §§ 2.403(a); 2.403, Comment 1. The Code expressly recognizes the power of the defaulting buyer to transfer good title to such a purchaser even though the transfer is wrongful as against the seller. The buyer is granted the *power* to transfer good title despite the fact that under § 2.507 he lacks the *right* to do so.

The Code definition of "purchaser" is broad, and includes not only one taking by sale but also covers persons taking by gift or by voluntary mortgage, pledge or lien. § 1.201(32), (33). It is therefore broad enough to include an Article Nine secured party. §§ 1.201(37); 9.101, Comment; 9.102(a), (b). Thus, if C.I.T. holds a valid Article Nine security interest, it is by virtue of that status *also* a purchaser under § 2.403(a). *See First Citizens Bank and Trust Co. v. Academic Archives, Inc.*, 10 N.C.App. 619, 179 S.E.2d 850 (1971); *Stumbo v. Paul B. Hult Lumber Co.*, 251 Or. 20, 444 P.2d 564 (1968); *In re Hayward Woolen Co.*, 3 U.C.C. Rep. 1107 (D.Mass., 1967).

While I shall discuss in detail *infra*, the implications of C.I.T.'s security interest under Article Nine and under other Article Two provisions, I here note that C.I.T. is the holder of a perfected Article Nine interest which extends to the goods claimed by the seller Stowers.

Attachment of an Article Nine interest takes place when (1) there is agreement that the interest attach to the collateral; (2) the secured party has given value; and (3) the debtor has rights in the collateral sufficient to permit attachment. § 9.204(a).

(1) *The agreement*: In 1963, Samuels initially authorized C.I.T.'s lien in its after-acquired inventory. The agreement between these parties remained in effect throughout the period of delivery of Stowers' cattle to Samuels.

[4] (2) *Value*: At the time of Stowers' delivery, Samuels' indebtedness to C.I.T. exceeded $1.8 million. This pre-existing indebtedness to the lender constituted "value" under the Code. § 1.201(44).

[5, 6] (3) *Rights in the collateral*: Finally, upon delivery, Samuels acquired rights in the cattle sufficient to allow attachment of C.I.T.'s lien. The fact that the holder of a voluntary lien—including an Article Nine interest—is a "purchaser" under the Code is of great significance to a proper understanding and resolution of this case under Article Two and Article Nine. The Code establishes that purchasers can take from a defaulting cash buyer, § 2.403(a). Lien creditors are included in the definition of purchasers, § 1.201(32), (33). A lien *is* an Article Nine interest, §§ 9.101, Comment; 9.102(b); 9.102, Comment. The existence of an Article Nine interest presupposes the debtor's having rights in the collateral sufficient to permit attachment, § 9.204(a). Therefore, since a defaulting cash buyer has the power to transfer a security interest to a lien creditor, including an Article Nine secured party, the buyer's rights in the property, however marginal, must be sufficient to allow attachment of a lien. And this is true even if, *arguendo*, I were to agree that the cash seller is granted reclamation rights under Article Two. *See First National Bank of Elkhart Cty. v. Smoker*, 11 U.C.C.Rept.Serv. 10, 19 (Ind.Ct.App., 1972); *Evans Products Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

[7, 8] If the Article Nine secured party acted in good faith, it is prior under § 2.403(a) to an aggrieved seller. Under the facts before us, I think that C.I.T. acted in good faith. The Code good faith provision requires "honesty in fact", § 1.201(19), which, for Article Two purposes, is "expressly defined as . . . reasonable commercial standards of fair dealing." §§ 1.201, Comment 19; 2.103(a)(2). There is no evidence that C.I.T. acted in bad faith in its dealings with Samuels, or that Stowers' loss resulted from any breach of obligation by C.I.T. There is no claim that the 1963 security agreement was the product of bad faith. The lender's interest had been perfected and was of record for six years when Stowers' delivery to Samuels occurred. There is no suggestion that the $1.8 million debt owing from Samuels to C.I.T. was the result of bad faith or of a desire to defeat Stowers' $50,000 claim. There is no claim that C.I.T. exercised or was able to exercise control over Samuels' business operations. There is no evidence that C.I.T. authorized or ordered or suggested that Samuels dishonor Stowers' check. There is no contention that C.I.T.'s refusal to extend credit on May 23, the date Samuels filed a voluntary petition on bankruptcy at a time when it owed C.I.T. more than $1.8 million, was violative of an obligatory future advance clause. The Code's good faith provision requires "honesty in fact", § 1.201(19); it hardly requires a secured party to continue financing a doomed business enterprise.

The majority deny that C.I.T. acted in good faith because, they claim, the lender had "intimate" knowledge of Samuels' business operations. The majority's source of information on the scope of C.I.T.'s knowledge is a little puzzling. The Referee in Bankruptcy found only that "C.I.T. knew or should have known of the manner by which the bankrupt bought livestock . . . on a grade and yield basis." *In the Matter of Samuels & Co., Inc.*, No. BK 3-1314 (N.D. Tex., order of Jan. 19, 1972). This factual finding was affirmed by the District Court which reversed the Referee and upheld C.I.T.'s propriety over Stowers. *Id.*, orders of Nov. 24, 1972, and Jan. 16, 1973. Neither the Referee nor the District Court found, nor have the parties alleged, that C.I.T.'s knowledge of Samuels' business extended to knowledge of

the debtor's obligations to third party creditors.

[9, 10] However, even if evidence had established that C.I.T. knew of Samuels' nonpayment and of Stowers' claim, C.I.T.'s status as an Article Two good faith purchaser would be unaffected. Lack of knowledge of outstanding claims is necessary to the common law BFP, and is similarly expressly required in many Code BFP and priority provisions. *See e. g.*, §§ 3.302; 6.110; 8.301, 8.302; 9.301(a)(2). But the Code's definition of an Article Two good faith purchaser does not expressly or impliedly include lack of knowledge of third-party claims as an element. The detailed definition of the Article's counterpart of the common law BFP requires only honesty in fact, reasonable commercial behavior, fair dealing. And this describes precisely C.I.T.'s dealings with Samuels: during the period May 13–22—the time when the bulk of Stowers' cattle were delivered and the time of the issuance of the NSF checks—C.I.T.'s advances to Samuels totalled $1 million. The advances were curtailed on May 23 because of Samuels' taking voluntary bankruptcy at a time when its indebtedness to C.I.T. was enormous. The decision to terminate further funding was clearly reasonable. It was also fair, and honest, and, as the majority have failed to grasp, was not the cause of Stowers' suffering. As I note *infra* in my analysis of rights under Article Nine, the sellers' loss was avoidable through perfection of their security interests in the cattle. If they had perfected, they would not only have been prior to C.I.T. as an Article Nine lender, § 9.312, but also protected against C.I.T. as an Article Two purchaser, § 9.201. As it happens, Stowers did not perfect. I believe the sellers cannot now be permitted to force an innocent, if prosperous, secured creditor to shoulder their loss for them.

II. Rights under § 2.507

The majority opinion devotes much of its concentration and energy to an analysis of the sellers' "reclamation right" under § 2.507 and § 2.702. Relying on an expansive reading of these Sections, the opinion concludes that a cash seller whose right to payment is frustrated through a check ultimately dishonored can "reclaim" proceeds of goods delivered to the buyer despite an interim third-party interest, and despite a year-long delay in seeking reclamation. I am unable to accept this reading of Code policy and requirements.

[11] Although the Code expressly grants a credit seller the right and power to reclaim goods from a breaching buyer, the right is triggered only by specific and limited circumstances; it can be asserted only if an exacting procedure is followed; and the right can never be asserted to defeat the interests of certain third parties who have dealt with the defaulting buyer. § 2.702(b), (c). There is no Code Section expressly granting a similar reclamation right to a cash seller.

The seller's remedies upon breach are enumerated in § 2.703. These provisions do not include or suggest a right or power in a cash seller to recover goods already delivered to a breaching buyer. Nevertheless the courts have read a reclamation right into the Code. It is this judicially-confected right to reclaim goods in which the majority's reclamation analysis is grounded. However, the majority take the reclamation right beyond anything intimated by the Code or heretofore permitted by courts recognizing a cash seller's reclamation right.

MATTER OF SAMUELS & CO., INC.

[12] The cash seller's right to reclaim has been drawn from the language of § 2.507(b) and § 2.507, Comment 3. I note, first, that the remedy granted by § 2.507(b) is one of seller against buyer, *see In re Helms Veneer Corp.*, 287 F.Supp. 840 (W.D.Va., 1968). It does not concern rights of seller against third parties. Section 2.507, Comment 3 explains that the seller's rights under § 2.507 must "conform with the policy set forth in the bona fide purchase section of this Article," i. e., with § 2.403. As I have noted above, under this provision the rights of an aggrieved cash seller are subordinated to those of the buyer's good-faith purchasers, including Article Nine lenders such as C.I.T. Thus, the Code provisions supporting a cash seller's reclamation right expressly preclude recovery by Stowers as against C.I.T. See §§ 2.507(b); 2.507, Comment 3; 2.702(b), (c). *See also Stumbo v. Paul B. Hult Lumber Co.*, 251 Or. 20, 444 P.2d 564 (1968); *In re Hayward Woolen Co.*, 3 U.C.C.Rep. 1107 (D.Mass., 1967); *Evans Products Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

Moreover, those courts which have permitted reclamation under § 2.507 have invariably adhered to § 2.507, Comment 3's express requirement that demand for return be made within ten days after receipt by the buyer or else be lost. *See In re Colacci's of America, Inc.*, 490 F.2d 1118 (C.A.10, 1974); *In re Helms Veneer Corp., supra; Stumbo v. Paul B. Hult Lumber Co., supra; In re Mort*, 208 F.Supp. 309 (E.D.Pa., 1962).

In the instant case, demand was not made within ten days or ten weeks; it came a full year after delivery to Samuels. The majority excuse this gross noncompliance by finding that the sellers' failure was the product of innocent error, and, in any event, was not required since the "purpose" of the demand rule—protection of purchasers of the delivered goods—was served through C.I.T.'s alleged intimate knowledge of Samuels' business operations.

[13] The Code's ten-day provision is an absolute requirement. There is no exception in the Code Sections or Comments, express or implied, to the statutory period. I would be hesitant to read any extension into a statute of limitations clear and unambiguous on its face, and particularly unwilling to allow an extension some 36 times greater than the statutory maximum. My reluctance is all the greater where the right at issue is not granted by the Code but is rather the product of judicial interpretation of a Comment which, whatever grant of power it may suggest, expressly limits that right to a ten-day life.

[14] The spirit in which the rule was broken seems to me irrelevant. Even conceding that Stowers' noncompliance occurred in absolute good faith, it was nonetheless noncompliance. Mistake of law does not constitute excuse of mistake.

[15] C.I.T.'s apocryphal intimate knowledge of Samuels' business operations is, I believe, also irrelevant to a determination of the validity of Stowers' claim. The majority find the purpose of the ten-day rule to be one of notice to third parties that a claim exists. I have somewhat greater difficulty than my brothers in pinpointing the purpose of the ten-day rule. But I am convinced that the goal is not one of protection or notice to third-party purchasers, for their rights are secure under the Code as against the aggrieved seller even if demand is timely made. §§ 2.507, Comment 3; 2.702(c). The Code does not condition the purchasers' rights on a lack of knowledge of the seller's interest.

With or without knowledge, the purchaser rests secure. I am therefore forced to conclude that the ten-day rule serves some function other than notifying third-party takers, and, consequently, that even if C.I.T. knew of Stowers' claim, the sellers' obligation under the ten-day rule would not have been excused. And even if knowledge by the purchaser suspended the sellers' duty to make a timely demand, the record in this case is devoid of any hint that C.I.T. knew of Samuels' breach and Stowers' reclamation right.

[16] Moreover, § 2.507 and § 2.702 speak of a right to reclaim goods. Neither provision grants a right to go after proceeds of those goods. Where a right or interest in proceeds is recognized by the Code it is recognized expressly. *See e. g.*, § 9.306. The right granted by § 2.507 is narrowly defined. I am unwilling to imply an extension to such a short-lived and precisely drawn remedy.

[17] Finally, even if there were a right to reclaim proceeds, even if the right had been timely exercised, and even if it could have been exercised despite the transfer of interest to C.I.T., Stowers would have taken subject to C.I.T.'s perfected Article Nine interest. See §§ 9.201, 9.301, 9.306, 9.312. *See also* my discussion of C.I.T.'s rights and interest under Article Nine, *infra*.

III. Rights under § 2.511

The majority opinion states that C.I.T.'s interest cannot be found superior to Stowers' because such a finding would violate § 2.511's prohibition on penalizing a seller for accepting as payment a check which is ultimately dishonored. I believe the majority have misconstrued the scope and significance of § 2.511.

[18] Like § 2.507, § 2.511 concerns claims of the seller as against the buyer. See § 2.511(c), § 2.511, Comment 4. On its face it does not affect the rights of third parties taking from the defaulting buyer. Moreover, and more important, the seller is not here "penalized" for taking an N.S.F. check. Such loss as Stowers suffered is the direct result of his failure to comply with Code provisions which, once followed—and regardless of Stowers' acceptance of Samuels' check—would have made his interest invulnerable to claims by C.I.T. *See, e. g.*, §§ 9.107; 9.201; 9.301; 9.312(c), (d).

IV. Rights under Article Nine

I am also unable to agree with the majority's conclusion that, under the Code, Stowers' interest is different from and greater than a security interest. Similarly, I disagree with the theory that by virtue of Stowers' power under Article Two, C.I.T.'s security interest is subject to defeat since it (1) could not attach because the debtor's rights in the collateral were too slight to permit attachment and (2) was subject to defeat even if it attached because a security interest collapses if the debtor's right to the property is extinguished. The majority's result is achieved only by ignoring or circumventing the plain meaning of Article Nine and Article Two.

Prior to the enactment of the Uniform Commercial Code, seller and buyer could agree that, despite buyer's possession, title to goods sold was to remain in the seller until he was paid. Such a reservation of title under the "cash sale" doctrine would defeat not only a claim to the goods by the defaulting buyer, but also the claims of lien creditors of the buyer, for the buyer's naked possession could give rise to no interest to which a lien could attach.

However, the U.C.C. specifically limits the seller's ability to reserve title once he has voluntarily surrendered possession to the buyer: "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." § 2.401(a). *See also* § 1.201(37). The drafters noted the theory behind this provision: "Article [Two] deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed." § 2.401, Comment 1.

The majority opinion interprets § 2.401(a) as applying only to "credit" sales, and of no effect where the parties have contracted a "cash" sale. However, the Code provision speaks of "any reservation of title." It does not on its face apply solely to credit sales. There is no authority under the Code for the majority's restrictive interpretation. Numerous courts have, in fact, applied § 2.401 to cash sales. *See e. g., Guy Martin Buick, Inc., v. Colo. Springs Nat'l Bank*, 32 Colo.App. 235, 511 P.2d 912 (1973); *First Nat'l Bank of Elkhart Cty. v. Smoker*, 11 U.C.C.Rep. 10 (Ind.App., 1972); *English v. Ralph Williams Ford*, 17 Cal.App.3d 1038, 95 Cal.Rptr. 501 (1971); *Evans Products v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966). I have been unable to find even one case suggesting that § 2.401 applies only to credit sales.

[19] If the majority were correct, the Section would be merely definitional, for a credit sale is but a sales transaction in which the seller reserves a security interest. However, § 2.401 is not definitional. It is operational and concerns the effect of transfer of possession under a sales contract upon any reservation of title. Neither law nor logic leads me to believe that § 2.401 is correctly interpreted to exclude cash sales.

The majority also suggest that Stowers' interest cannot be characterized as a security interest subject to Article Nine requirements and priorities since, the majority conclude, such interests must be "consensual". While it is true that many interests governed by Article Nine are consensual, §§ 9.102; 9.102, Comment, the Code clearly subjects Article Two security interests arising not by consent but by operation of law to Article Nine. *See* §§ 2.401(a); 9.113; 9.113, Comment 2. *See also* §§ 2.326; 9.114; 9.102, Comment 1.

Since Stowers' interest upon delivery of the cattle to Samuels was limited to a security interest subject to Article Nine, §§ 2.401(a); 9.113, the validity of C.I.T.'s Article Nine interest becomes crucial. If C.I.T. is the holder of a perfected Article Nine interest in the collateral claimed by Stowers through its unperfected § 2.401 interest, C.I.T.'s interest will prevail over Stowers', § 9.312(e).

[20] The majority assert that C.I.T. cannot claim an interest in the cattle because Samuels' interest was too slight to permit attachment. *See* § 9.204(a). As I noted in my discussion of rights under § 2.403, this argument ignores the significance of § 2.403(a) and § 1.201(32), (33). The Code anticipates a situation where the interest of an unpaid cash seller who has delivered goods to a breaching buyer is subordinated to the interest of "purchasers" of the buyer. Lien creditors are included in the definition of "purchasers"; in order that there *be* lien creditors, the buyer's interest must be great enough to allow attachment. Therefore, however, Samuels' interest upon delivery of the cattle is defined, and however slight or tenuous

or marginal it was, it was necessarily great enough to permit attachment of a lien, including C.I.T.'s Article Nine interest.

The majority find that even if attachment occurred, C.I.T.'s interest would be defeated by Stowers' reclamation. The theory behind this argument is that the rights of the Article Nine secured party are at best coextensive with the rights of the debtor; if the debtor loses his rights, the security interest too is lost.

[21] Upon nonpayment Samuels lost the right to retain or dispose of the property, but the Code recognizes that the breaching buyer had the power to encumber, despite nonpayment, so long as he retained possession. §§ 2.403(a); 1.201(32), (33). In the instant case, this power arose as a result of Stowers' delivery, and it did not terminate while the goods remained in Samuels' hands. The whole point of Article Nine is the continuity of perfected security interests *once they have properly attached,* despite subsequent loss of control or possession of the collateral by the debtor. § 9.201. Article Nine does not except an unpaid cash seller from this overall plan. In fact it specifically provides a means for him to perfect and become prior to previous perfected security interests. § 9.312(c), (d).

To hold that a reclaiming seller is given the power to sweep away a security interest which was able to attach only as a direct and Code-approved result of his voluntary act of delivery to the buyer would require ignoring the meaning and interplay of Article Two and Article Nine. Article Two recognizes the continuous vitality and priority of an Article Nine interest over the rights of an aggrieved seller. *See* §§ 2.403(a); 2.507, Comment 3; 2.702(c). It would be error to believe that a proper analysis of Article Nine could require the extinction of an identical Article Nine interest in the very circumstances specified by Article Two as triggering the priority of lienor over seller. *See* §§ 2.403(a); 2.507(b); 2.507, Comment 3; 2.702(b), (c); 9.102; 9.107(1); 9.312(c), (d).

Any seeming unfairness to Stowers resulting from the Code's operation is illusory, for the sellers could have protected their interests, even as against C.I.T.'s prior perfected interest, if they had merely complied with the U.C.C.'s purchase-money provisions. §§ 9.107, 9.312(c), (d). The Code favors purchase-money financing, and encourages it by granting to a seller of goods the power to defeat prior liens. The seller at most need only (1) file a financing statement and (2) notify the prior secured party of its interest before delivery of the new inventory. The procedure is not unduly complex or cumbersome. But whether cumbersome or not, a lender who chooses to ignore its provisions takes a calculated risk that a loss will result.

In the instant case Stowers did not utilize § 9.312's purchase-money provision. The sellers never perfected. Thus, in a competition with a perfected secured party they are subordinated, and, in this case, lose the whole of their interests. *See* §§ 9.201, 9.301, 9.312(e).

V. Rights under the Bankruptcy Act

[22] C.I.T.'s perfected security interest is not subject to defeat by the Trustee in Bankruptcy Mahon. If, however, C.I.T. were to have abandoned its claim against Samuels, Stowers would nonetheless have lost in a priority contest with the Trustee.

[23] Bankruptcy Act § 70c confers the status of a hypothetical lien creditor upon the Trustee. Mahon could assert those § 70 rights against Stowers, an unperfected secured party, and would prevail under U.C.C. § 9.301(a)(2), (c).

[24] *Bank of Marin v. England,* 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966), does not strengthen Stowers' claim. In that case the drawer of a check took bankruptcy after the check had been issued but before presentment. The drawee paid on the instrument without notice or knowledge of the bankruptcy. Such payment was in compliance with U.C.C. §§ 4.303, 4.401 and 4.402. The Supreme Court found that an application of Bankruptcy Act § 70d under these circumstances would work a hardship on the payee or drawee. *Bank of Marin* has been critically attacked by scholars, *see e. g.,* 4A Collier on Bankruptcy, § 70.68 at 755 (14th Ed. 1971). In any event, the "inequity" in *Bank of Marin* occurred when a loss resulted from the effect of a federal statute upon good faith compliance with state statute. The federal statute's operation and effect were wholly beyond the control of the innocent drawee. In the instant case Stowers' loss resulted from his own failure to comply with state law which would have enabled him to perfect his purchase money security interest. The loss could have been avoided through his own efforts. This is not the kind of loss equity protects against.

[End of Appendix]

GEE, Circuit Judge (specially concurring):

Troubled by the seeming harshness of the result, I nevertheless concur, despite its effect to force a cash seller to act like a credit seller to protect his interest. It asks much of these small cattle dealers, selling their cattle for cash, that they wrangle with the complicated provisions of art. 9 to protect themselves against an insufficient funds check, but this seems to be the clear demand of the Texas Code. In the normal course of dealing, such a check will give a seller an action on the instrument as well as for breach of the contract of sale, all in addition to the remedy of reclamation read into the Code by some courts. This protection is adequate except in cases such as this, where the buyer writes a bad check and subsequently declares bankruptcy. All sellers who accept checks run the same risk—some take out insurance against such a loss by the simple procedure of drawing up and filing a security agreement giving them rights in the goods sold to secure the purchase price.

Such an agreement can be filed in advance, so there is no need to wait until one receives a check to fill out a security agreement and race to file it before the bank dishonors the check. The very nature of this transaction recommended taking this simple additional precaution of filing a purchase money security interest—the cows were immediately slaughtered, making it impossible to recover the "goods" if the deal fell through, and, too, the delayed pricing arrangement transformed the "cash sale" into a credit transaction for all commercial purposes regardless of how the two parties characterized it. Comment 6 to art. 2–511 says acceptance of a check postdated by even one day "insofar as *third parties* are concerned, amounts to a delivery on credit and the [seller's] remedies are set forth in the section on buyer's insolvency (§ 2–702)." As Judge Hughes pointed out in the district court opinion, Stowers' delivery of livestock to the bankrupt without perfecting a security interest therein placed the bankrupt in such a position that it could transfer good title to a good faith purchaser for value, which is precisely what Samuels did.

AINSWORTH, Circuit Judge, with whom BELL, INGRAHAM, COLEMAN and GEWIN, Circuit Judges, join (dissenting):

A divided en banc court has decided that the majority panel opinion of Judge Ingraham (concurred in by Judge Ainsworth) should be reversed and the district court's judgment should be affirmed in accordance with Judge Godbold's dissenting opinion. It is our view that in doing so, the court has erred in its application of the Texas Business and Commerce Code (U.C.C.) to the undisputed facts. The majority has relied on Code provisions which are applicable to credit rather than cash transactions involved here. Code provisions relative to good faith purchasers have also formed the basis of the prevailing opinion though C.I.T., the finance company, which now prevails in its claim, is not a good faith purchaser, as we shall show. Nor does equity support the majority court's decision as the result of which 15 cattle farmers lose the proceeds of their livestock amounting to $54,793.26 which are awarded to a competing claimant, C.I.T. C.I.T. thus achieves a windfall at the expense of the cattlemen who sold their cattle to the packer in the usual manner of the trade for cash, but were paid with checks later dishonored by the bank on which they were drawn.

When the Supreme Court remanded this case to us, it said:

> We hold that, on the undisputed facts of this case, nothing in the Packers and Stockyards Act or the regulations issued by the Secretary under the Act overrides the Texas Business and Commercial Code in determining the respective rights of the parties to the funds held by the trustee. We do note, however, that an isolated passage at the end of the Court of Appeals' opinion states that the "Packers and Stockyards Act and Regulations 201.42 and 201.99 thereunder comprise a course of dealing and usage of trade known to both the bankrupt packer and C.I.T., which had financed it for an extended period." 483 F.2d 557, 563. While we hold that the Act and regulations do not *ex proprio vigore* override the provisions of Texas law determining priorities to the funds in question, we do not mean to say that a course of conduct mandated by the Act or regulations might not, just as any other course of conduct, be relevant or even dispositive under state law. The District Judge, herself a longtime Texas practitioner and then state court judge before taking the federal bench, determined otherwise here. To the extent that respondents in appealing to the Court of Appeals challenged that determination, it will of course be open for adjudication in the Court of Appeals on remand.
>
> The petition for certiorari is granted and the judgment of the Court of Appeals is reversed and the case is remanded for proceedings not inconsistent with this opinion.

416 U.S. at 113–114, 94 S.Ct. at 1632.

The panel (Ainsworth, Godbold, Ingraham, JJ.) considered the matter on remand in light of the Supreme Court's directions. Basing its opinion on provisions of the Texas Business and Commerce Code, the panel held (Godbold, J., dissenting) that the judgment of the district court should be reversed and the proceeds of the cattle paid to the cattle farmer claimants in the bankruptcy proceedings.

The majority panel decision written by Judge Ingraham correctly interprets the Texas Business and Commerce Code in light of the undisputed facts. In a lengthy and scholarly opinion Judge Ingraham has carefully analyzed the applicable Code provisions and has shown the inapplicability of the Code sections relied on by Judge Godbold in his dissent. Judge Ingraham's opinion is unassailable under the circumstances of this case. It is based upon correct application of the standard U.C.C. provisions adopted by the Texas Business and Commerce Code, and the opinion should have been affirmed by the en banc court. Not only would the result comport with proper interpretations of the Code, and the undisputed facts, but it would likewise do equity between the parties. We shall draw liberally on Judge Ingraham's well-reasoned opinion for support of our views in this dissent.

We begin with the undisputed facts as to which the Supreme Court stated in its opinion:

> The uncontested facts in this case are contained in the findings of the bankruptcy referee. The referee found that respondents, for a period of some ten days before Samuels filed a Chapter XI petition under the Bankruptcy Act, had been selling live cattle to Samuels for slaughter on a "grade and yield" basis, and that this was a recognized custom and usage in the trade. Under this usage the contract price is left open at the time of delivery to the purchaser, who slaughters the livestock and allows the carcasses to chill for approximately 24 hours. At that time they are graded by the United States Department of Agriculture and the price is determined. The purchaser then gives the seller a check for the established amount. The referee further found that Samuels was subject to the regulations of the Packers and Stockyards Act, and that all of the livestock in question had been delivered to Samuels at its plant in Mount Pleasant, Texas, where it was slaughtered and then graded by the Department of Agriculture.
>
> Until the livestock is actually graded and the yield determined, the sellers can identify their particular livestock, but once the carcasses are processed and the meat packaged, identification is no longer possible. When the petition for bankruptcy was filed in this case, none of the respondents was able to identify his own particular livestock, but the referee found that at least some of the carcasses sold by respondents were on Samuels' premises at that time. The referee also determined that no proceeds from sale of packaged meat could be identified as realized from carcasses delivered by respondents.
>
> Examining the competing claims, the referee found that at all times material to the action C.I.T. was the holder of a duly perfected security interest in all livestock, animal carcasses, packaged and unpackaged meat, packing materials, and other inventory owned by Samuels or in which Samuels may have had an interest. At the time the bankruptcy petition was filed Samuels was indebted to C.I.T. in an amount in excess of $1,800,000. C.I.T. had been advancing large sums weekly to Samuels, and the bankruptcy was precipitated on May 23, 1969, when C.I.T., deeming itself to be insecure, refused to make a weekly advance of approximately $184,000 which Samuels needed to continue its operations. The referee found that C.I.T. "knew or should have known" of the method by which Samuels bought livestock from respondents on a grade-and-yield basis. He further found that no respondent held a security agreement with Samuels,

and that none had filed a financing statement reflecting the transactions with Samuels.

The referee reasoned from these facts that respondents and Samuels had intended to transact their sales business on a cash, rather than a credit, basis, and that title to the livestock "did not pass from plaintiff to bankrupt until payment was made to plaintiff." Therefore, he concluded, C.I.T.'s perfected lien could not attach to the livestock in Samuels' inventory until the checks issued in payment were subsequently honored. Any other decision would, he said, make the cattle sellers "a species of involuntary creditor against their wishes and intent," although they had complied with normal selling arrangements under the Packers and Stockyards Act. He found it unnecessary for the respondents to identify proceeds from the sale of specific carcasses which they had delivered, and placed the duty on C.I.T. to show that the funds to which it laid claim had not been received from the sale of carcasses furnished by respondents.

416 U.S. at 102–104, 94 S.Ct. at 1627.

Continuing with a consideration of other undisputed facts, the Referee found that "a crisis was precipitated on May 23, 1969" when C.I.T. refused to make a further weekly advance of $184,000 and "took steps to commence the liquidation of its outstanding loans to Samuels." On the same day Samuels filed the Chapter XI bankruptcy petition and a receiver was appointed, later a trustee, to continue the operations of the packer. Samuels continued to operate under a receivership, and it was not until May 6, 1970, about a year later, that the company was finally adjudicated a bankrupt. Further, the Referee held in his findings that in the beginning of the bankruptcy proceedings, "As a matter of necessity arrangements had to be worked out for the trustee under the direction of the court to sell the perishable meat on hand with the proceeds to be held subject to the order of the court so that these contests could be fought out over money. That has been done." The bankrupt slaughtered the animals and sold meat at wholesale to various customers in intrastate and interstate commerce.

According to the trustee's report, "there is no possibility of any dividend to be paid to general creditors."

The cattle had been sold for cash by the 15 cattle farmers to Samuels on various dates from May 12 through May 23, 1969, in accordance with the Packers and Stockyards Act, 7 U.S.C. § 181 et seq. and regulations thereunder, on a so-called grade and yield basis.[1] The Referee also found that as soon as the bankruptcy petition was filed, the bank on which the checks had been drawn to pay the cattle sellers stopped payment and returned them marked not sufficient funds.

It is, of course, undisputed that the transactions involved here by the sellers of cattle were on a cash, not a credit, basis with the packer. This being true, Judge Ingraham in the majority panel opinion reasoned as follows:

> Underlying the different characteristics and consequences of cash and credit sales are the expectations and intentions of the three parties concerned. When goods are sold for cash, the seller is assuming virtually no risk of loss because he believes that he has full payment for the goods in his hands. When the sale is for credit, however, the seller assumes a far more substantial risk and voluntarily relinquishes the incidents of ownership to the buyer. The buyer, possessed of these incidents of ownership, is capable of conveying title to a bona fide purchaser, completely terminating the rights of the seller in the goods. The credit seller recognizes that he will receive full payment for his merchandise

1. The applicable regulations are found in 9 C.F.R. as follows:

§ 201.43 Payment and accounting for livestock and live poultry.

(b) *Purchasers to pay promptly for livestock.* Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction. The provisions of this section shall not be construed to permit any transaction prohibited by § 201.61(a) relating to financing by market agencies selling on a commission basis.

(Emphasis added.)

§ 201.99 Purchase of livestock by packers on a carcass grade, carcass weight, or carcass grade and weight basis.

(a) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis shall, prior to such purchase, make known to the seller, or to his duly authorized agent, the details of the purchase contract. Such details shall include, when applicable, expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

(b) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis, shall maintain the identity of each seller's livestock and the carcasses therefrom and shall, after determination of the amount of the purchase price, transmit or deliver to the seller, or his duly authorized agent, a true written account of such purchase showing the number, weight, and price of the carcasses of each grade (identifying the grade) and of the ungraded carcasses, an explanation of any condemnations, and any other information affecting final accounting. Packers purchasing livestock on such a basis shall maintain sufficient records to substantiate the settlement of each transaction.

(c) When livestock are purchased by a packer on a carcass weight or carcass grade and weight basis, purchase and settlement therefor shall be on the basis of carcass price. This paragraph does not apply to purchases of livestock by a packer on a guaranteed yield basis.

(d) Settlement and final payment for livestock purchased by a packer on a carcass weight or carcass grade and weight basis shall be on actual (hot) carcass weights. The hooks, rollers, and gambrels or other similar equipment used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare weight shall include only the weight of such equipment: *Provided, however,* That until July 1, 1968, these packers who shroud carcasses before weighing them may include in the tare weight the average weight of the shrouds and pins.

(e) Settlement and final payment for livestock purchased by a packer on a USDA carcass grade shall be on an official (final—not preliminary) grade. If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller or his duly authorized agent. For purposes of settlement and final payment for livestock purchased on a grade or grade and weight basis, carcasses shall be final graded before the close of the second business day following the day the livestock are slaughtered.

[33 F.R. 2762, Feb. 9, 1968, as amended at 33 F.R. 5401, Apr. 5, 1968]

only if the business of the buyer progresses normally and sales are made to third parties in the normal course of business. Note, The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code, 72 Yale L.J. 1205, 1220 (1963). Although commercial transactions and the law governing such relationships has developed significantly since the conception of these doctrines, this reasoning with respect to the different risks assumed by the different sellers underlie and differentiate the two concepts and is as valid a distinction today as it was when the doctrines were originally conceived.

The Uniform Commercial Code as adopted by the State of Texas has to some extent modified the common law doctrines of cash and credit sales. It is clear that the historical concept of passing title to goods is not emphasized in the Code, and the location of title generally is not regarded as being determinative of the rights of adverse parties. Helstad, Deemphasis of Title Under the Uniform Commercial Code, 1964, Wisconsin L.R. 362. Instead of implementing the fictional concept of title, the countervailing interests of the parties are sometimes defined in terms of various rights, privileges, powers and immunities.

But even though the title concept is so reduced in significance, the Code recognizes and adopts the fundamental distinctions of the common law between cash and credit sales, at least with respect to the rights of the unpaid seller against the defaulting buyer. The Code deals with a sale on credit in provisions separate from those dealing with cash sales.

. . . . . .

(Emphasis added.) 510 F.2d at 144.

Further, as to the Code provisions affecting cash sales, Judge Ingraham said:

> With respect to cash sales, however, § 2.507 of the Code explicitly recognizes that "unless otherwise agreed," "[w]here payment is due and demanded on the delivery to the buyer of goods . . . , [the buyer's] right as against the seller to retain or dispose of them is conditional upon his making payment due." Texas Business and Commerce Code, § 2.507(b) (1968). Like the cash sale doctrine at common law, § 2.507 provides that when the buyer is to pay cash for the goods, the validity of the transaction is dependent upon his making payment, and when the buyer fails to pay, he does not even have the right to possess the goods. Absolute ownership does not pass to the buyer until payment is complete.
>
> The limited interest conveyed to the buyer prior to payment under § 2.507(b) is reemphasized in § 2.511(c), which deals specifically with the situation where payment for goods is made by check that is later dishonored. Section 2.511(c) provides that payment by check "is conditional and is defeated as between the parties by dishonor of the check on due presentment." Texas Business and Commerce Code, § 2.511(c) (1968). Underlying this provision is the principle that, in order to encourage and facilitate commercial sales and economic growth generally, the recipient of a check in payment for goods "is not to be penalized in any way" for accepting this commercially acceptable mode of payment. *Id.* Comment 4.

510 F.2d at 145–146.

On July 23, 1969, two weeks after Samuels' Chapter XI petition in bankruptcy was filed, C.I.T. filed a reclamation petition relative to its claims to the assets and inventory of the bankrupt and in effect claimed all of Samuels' assets under its previously recorded lien. Included therein, of course, was a claim by C.I.T. to the proceeds of the sale of the cattle which belonged to the 15 livestock producers whose checks in payment thereof had been dishonored by the bank when C.I.T. declined further to finance the operations of the packer.

On August 13, 1969, the Referee issued his order on the reclamation petition of C.I.T. which reads in part as follows:

> IT IS FURTHER ORDERED that C.I.T. Corporation is a secured creditor with respect to all of the assets described in its Petition for Reclamation save and except for the following assets of the Debtor as to which the determination of such secured status is reserved for further consideration by the Court:
>
> (a) Accounts receivable of the Debtor resulting from sales or deliveries by the Debtor on May 23, 1969, and as to which accounts receivable *no advances were made by C.I.T. Corporation and any other accounts receivable as to which C.I.T. Corporation made no specific advances.*

(Emphasis added.)

It is unreasonable to require a cash seller, such as the cattlemen here, to follow Code provisions for obtaining a security interest which are obviously applicable only to credit transactions. As Judge Ingraham said:

> . . . In a cash sale the seller believes, and not unreasonably, that he has his payment in hand. The only phase of the transaction left uncompleted is the seller's cashing the check. All he has to do is put the check in the mail and wait for it to be cleared at the bank, or take the check directly to the bank and cash it. Because the limited time sequence, extending from the receipt of the check to its being cashed, is so short, it would be unreasonable to require the cash seller to follow the litany of the Code and take measures to perfect an alleged security interest. *See* Corman, Cash Sales, Worthless Checks and the Bona Fide Purchaser, 10 Vanderbilt L.R. 55, 65 (1956).

510 F.2d at 149.

Further, Judge Ingraham concluded, in this regard:

> Supporting the conclusion that the seller's rights are not cut off under Article 9 are the explicit provisions of the Code. Section 9.102 and the accompanying comments broadly define the scope of Article 9, but carefully limit its application to commercial transactions in which the parties intend to create security interests. As found by the referee, and it has not been contested in this court, each of the cattle sellers involved in this litigation regarded the sale to Samuels as a cash transaction, and there is nothing in the record to suggest that any of the parties involved thought it was anything but a cash sale. Selling goods on a credit basis involved the assumption of a far greater risk on the part of the seller than when the goods are sold for cash. To summarily label these sellers as holders of unperfected security interests would change entirely the nature of the transaction as it

was intended by the parties, and alter the cash seller's status to one who thinks he has full payment for his goods to one in which he stands as a mere unsecured creditor. The Code was designed to supplement the agreement between the parties in commercial transactions where the parties failed to provide, not completely change the character of an existing relationship. *See* Bunn, Freedom of Contract Under the Uniform Commercial Code, 2 B.C.Ind. & Com.L.R. 59 (1960); J. White and R. Summers, The Uniform Commercial Code 6 (1972).

510 F.2d at 149–150.

Samuels not having paid for the cattle and its right as against the sellers to retain or dispose of them being conditional under Texas Code §§ 2.507(b) and 2.511(c), C.I.T.'s rights as lienholder "derived solely from the rights of the debtor, also terminated." 510 F.2d at 150.

Is C.I.T a Good Faith Purchaser Under the Code?

The majority having conceded that the transactions here were sales for cash and payment not having been made to the sellers because the checks were dishonored by the bank after the intervening bankruptcy petition of Samuels, the only point left upon which the majority can possibly rely is that C.I.T. and the trustee were good faith purchasers for value. In this regard the majority per curiam adds to Judge Godbold's dissenting opinion footnote 3, which states in part as follows:

> 3. The district judge held in her written order in this respect as follows:
>
> C. Plaintiffs, by making delivery of the livestock to the Bankrupt without perfecting a security interest therein, placed the Bankrupt in such a position that it could transfer good title to a good faith purchaser for value including C.I.T. and the Trustee, as provided in Section 2.403(a) of the Code.
>
> Order dated November 24, 1972.

Also we note a matter not mentioned in the dissenting opinion of Judge Godbold. The District Court, which accepted the Referee's findings of fact but rejected his conclusions of law, held that C.I.T. and the trustee in Bankruptcy were good faith purchasers for value, *and the Supreme Court in its opinion referred to them as such.* 416 U.S. at 104, 94 S.Ct. at 1628, 40 L.Ed.2d at 84.

(Emphasis added by this dissenting opinion.)

That part of the above quotation, "and the Supreme Court in its opinion referred to them as such," infers that the Supreme Court held that C.I.T. and the trustee were good faith purchasers for value.

But the Supreme Court did not so hold. Reference to the page citation from whence the statement in footnote 3 of the majority per curiam is apparently derived discloses the following sentence in the Supreme Court opinion: "Delivery of the cattle to Samuels on this basis enabled it to transfer good title to a good-faith purchaser for value, a category of persons which included both C.I.T. and the trustee in bankruptcy." (Footnote omitted.) But reference to the entire paragraph from which the sentence is quoted discloses that the Supreme Court did not make a finding to the effect that C.I.T. and the trustee were good faith purchasers for value but merely recited that *the district court* had so held.[2] We quote the entire paragraph from the Supreme Court opinion to show that the majority's inference that the Supreme Court has already held that C.I.T. and the trustee are good faith purchasers for value is incorrect and not in context.

> The District Court accepted the referee's findings of fact but reversed on the law. Turning to the provisions of the Texas Business and Commercial Code, which are largely counterparts of the Uniform Commercial Code, the court found that the respondents by their delivery of the cattle had retained only a security interest in those animals and the proceeds therefrom.[1] It further found that the respondents had taken no action to perfect their security interest[2] nor attempted to utilize any right of reclamation they might have had under Texas law.[3] *Delivery of the cattle to Samuels on this basis enabled it to transfer good title to a good-faith purchaser for value, a category of persons which included both C.I.T. and the trustee in bankruptcy.*[4] The District Court also found that respondents were unable to "establish their right to possession by ownership . . . [by] identify[ing] positively the property sought to be reclaimed in either its original or substituted form."

(Footnotes omitted.) (Italics supplied.) 416 U.S. at 104, 94 S.Ct. at 1628. The italicized sentence above is virtually in the identical language used by the district court and reproduced in footnote 2, ante.

There would have been no reason for the Supreme Court to remand this case to us for further consideration had it held in its opinion that C.I.T. and the trustee were good faith purchasers for value. Such a holding would have ended the matter. Of course, as we have pointed out, the Supreme Court made no such holding. In no sense can C.I.T. be considered a good faith purchaser for value. C.I.T., of course, did not purchase anything—the cattle here, or the meat, or anything else. It is in the finance business and it was the principal source of working capital for Samuels. Its role as shown in this case was to provide for Samuels' financial needs by accounts receivable and inventory financing on a weekly basis, which it did from June 18, 1963. In turn it was granted, and recorded, a lien and security interest covering all inventory, merchandise, accounts receivable, etc., of Samuels. C.I.T. claims its lien rights to the proceeds of the cattle farmers' livestock here under Code § 2.403(a) which provides in part that "a person with voidable title has power to transfer a good title to a good faith purchaser for value." Status as a purchaser is conferred on a lienholder by virtue of Texas Code § 1.201(32), (33). The opinion of Judge Ingraham completely refutes C.I.T.'s claim of good faith purchaser for value as follows:

> The third question is whether C.I.T. qualifies as a good faith purchaser. Under § 2.403 of the Code, the buyer of goods from a seller is vested with a limited interest that it can convey to a good faith purchaser and thus create in the purchaser a greater right to the goods than the buyer itself had. This is possible even when the buyer obtains the goods as a result of giving a check that is later dishonored or when the purchase was made for cash. But in order to attain this status, the proponent must be a *purchaser* that gives *value* and acts in *good faith.* While C.I.T. gave value for the goods within the meaning of the Code, it failed to meet the test of a purchaser or one acting in good faith.

With regard to C.I.T.'s status as a purchaser, the Code broadly defines this term as one who take "by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property." Texas Business and Commerce Code, § 1.201(32) (1968); *see id.* § 1.201(33). *As noted earlier, C.I.T. does not have an interest in the cattle because its rights in the collateral are derivative of its debtor's rights in it. When Samuels failed to pay for the cattle, its rights in the cattle terminated and thus so did C.I.T.'s.* C.I.T.'s status as a good faith purchaser is also defeated with regard to its acting in good faith. The Code defines good faith as "honesty in fact in the conduct or transaction concerned." Texas Business and Commerce Code, § 1.201(19) (1968). Implicit in the term "good faith" is the requirement that C.I.T. take its interest in the cattle without notice of the outstanding claims of others. *See Greater Louisville Auto Auction v. Ogle Buick, Inc., supra*, (Ky.), 387 S.W.2d (17) at 21. *See also Fidelity and Casualty Co. v. Key Biscayne Bank*, 501 F.2d 1322, 1326 (5th Cir. 1974).

It is true that the evidence does not reveal any breach of an express obligation on C.I.T.'s behalf to continue financing the packing house after Samuels filed a petition in bankruptcy. Nor does the good faith element require the creditor to continue to finance the operation of a business when it is apparent that the business is unprofitable and is going bankrupt. But because of the integral relationship between C.I.T. and Samuels, we do not see how C.I.T. could have kept from knowing of the outstanding claims of others. C.I.T. maintained close scrutiny over the financial affairs of Samuels' operations. C.I.T. had been financing Samuels' packing house operations for at least six years, and the financing involved the flow of millions of dollars. The amount of cash advances made to Samuels was not predetermined or determined arbitrarily, but was calculated only after C.I.T. examined weekly the outstanding account and the current inventory of the business. From such a continuous and prolonged study of the business to determine the amount of each weekly advance, C.I.T. must have been intricately aware of the operations and financial status of the business.

Since C.I.T. was so intimately involved in Samuels' financial affairs, it must have known that when it refused to advance additional funds, unpaid checks issued to cattle sellers by Samuels would be dishonored. Samuels' operations were totally dependent on the financing of C.I.T. and both parties knew it. From its enduring involvement in the weekly financing. C.I.T. apparently knew that Samuels was purchasing and processing cattle up until the very time of filing the petition. Knowing that cattle had been purchased and processed immediately preceding its refusal to advance more money, C.I.T. must have known as a result of this refusal that some cattle sellers who had recently delivered their cattle to Samuels would not be paid. Because C.I.T. and Samuels were so intertwined in the management of the financial affairs of the business, we do not think that C.I.T. can plausibly claim, in complete honesty, that it was unaware of the claims of the unpaid cattle sellers. Since C.I.T. was aware of these outstanding

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claims, it does not qualify as a good faith purchaser.

(Emphasis added.) 510 F.2d at 151–152.

It is important to remember, too, that the Referee in his findings of fact, which were accepted by the district court, held that "C.I.T. knew or should have known of the manner by which the bankrupt bought livestock from the plaintiffs on a grade and yield basis as hereinabove described."

The record does not disclose that any funds were advanced by C.I.T. on the faith of plaintiff's cattle, delivered to Samuels on the eve of its default and bankruptcy petition, being in Samuels' inventory. In fact, it is quite clear that C.I.T.'s decision not to advance funds to Samuels in the week involved directly resulted in Samuels' filing its petition in bankruptcy and the bank thereafter refusing to honor plaintiff's checks in payment of the cattle.

C.I.T.'s intimate knowledge over a long period of years of Samuels' financial affairs, having financed the packer on a weekly basis, shows beyond doubt that C.I.T. knew its decision not to advance further funds to Samuels would result in the cattle farmers involved here not being paid for their cattle. To allow C.I.T. under the guise of a good faith purchaser now to pick up all the proceeds of the cattle farmers' livestock does not comport with section 2.403 of the Code or with any other provision of the U.C.C. Its lien rights to the proceeds of the cattle here, as we have pointed out, were derivative of Samuels' rights. Samuels had no right to the proceeds since it had not paid for the cattle. Therefore, C.I.T. had no right thereto. Thus the majority opinion cannot stand logical scrutiny or the provisions of the Uniform Commercial Code adopted by the Texas Business and Commerce Code.

We believe that the court has an affirmative obligation to do equity in this bankruptcy proceeding in accordance with the Supreme Court's admonition in the (1966) case of *Bank of Marin v. England*, 385 U.S. 99, 103, 87 S.Ct. 274, 277, 17 L.Ed.2d 197, where the Court said, "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." Surely there is no equity in the court's awarding the proceeds of the cattle farmers' livestock to C.I.T., nor is such an award in accordance with the applicable provisions of the U.C.C.

The judgment of the district court should be reversed and the Referee's judgment in favor of plaintiff cattle farmers should be reinstated.[3]

3. The sellers' rights as against the trustee are adequately treated by Judge Ingraham's opinion, *see* 510 F.2d at 152–153.

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